119-327

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~570. 285~~ 46

RUFUS McCREERY, PLAINTIFF IN ERROR,

vs.

MRS. E. A. FULLER AND J. C. HASKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 17, 1883

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OCTOBER TERM, 1884.

No. 578.

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vs.

MRS. E. A. FULLER AND J. C. HASKELL.

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1 to 4 In the Supreme Court of the State of California.

R. McCREERY, Plaintiff and Respondent,
vs.
Mrs. E. A. FULLER *et al.*, Defendants and Appellants. } No. 8026.

Transcript on Appeal.

R. M. Widney, attorney for appellants.
W. D. Gould and J. H. Blanchard, attorneys for respondent.

5 *Complaint in Ejectment.*

In the District Court of the Seventeenth Judicial District, State of California, in and for the County of Los Angeles.

RUFUS McCREERY, Plaintiff,
vs.
Mrs. E. A. FULLER and J. C. HASKELL, Defendants.

The plaintiff above named, complaining of defendants above named, for cause of action, alleges:

6 That on the tenth day of October, A. D. 1879, the said plaintiff was the owner, and seized in fee, and possessed, and entitled to the possession of that certain lot of land situate in the county of Los Angeles, State of California, and described as follows:

The southeast quarter of section fourteen, in township two south, range fourteen west, San Bernardino Meridian. That while the plaintiff was such owner, seized and possessed, and entitled to the possession of said land and premises, the said defendants did, on the day and year aforesaid, wrongfully and unlawfully, and without right of title, enter into and upon the same, and oust and eject the plaintiff therefrom, and ever since that day wrongfully and unlawfully withheld, and still and now wrongfully and unlawfully do withhold, the possession thereof from the plaintiff, to his wrong, injury, and damage in the sum of three thousand dollars. That the value of the rents and profits of the said lands and premises is fifty dollars per month, and that by reason of the unlawful withholding of the said land by the defendants as aforesaid, plaintiff has been deprived, and by the continuance thereof will be deprived, of the use and occupation of the same, to his loss and damage in the sum of five hundred dollars.

7 And for equitable relief pending the above action, the plaintiff further represents:

That defendants are insolvent, and wholly unable to respond in damages threatened to be done to said premises. That plaintiff is informed and believes that defendants intend to remove from the premises the dwelling-house now thereon, of great value, and that the removal of said house will be of great and irreparable injury to the plaintiff. That, in addition to said threatened waste in the removal of said house, plaintiff is informed and believes that said defendants intend to remove the out-buildings upon said premises, and to destroy the fence now thereon, and fill up the well, and cut down

the trees now growing thereon, and commit other great waste and injury to said premises, which will render the judgment in this action ineffectual, and which will be of great and irreparable injury to the plaintiff.

Wherefore the plaintiff prays judgment against the said defendants for the restitution of said land and premises, and for the sum of three thousand dollars damages for the withholding thereof, and five hundred dollars damages caused by the loss of the value of the rents and profits thereof, together with his costs of suit; and that the defendants be restrained by injunction from injuring said premises, and from committing or permitting any waste on the said
8 premises; and that the plaintiff may have such other and further relief as the case may require, and as to this court may seem just and equitable.

Duly verified.

Filed October 28th, 1872.

A. W. POTTS, *Clerk.*

Answer.

(Title of Court and Cause.)

Now comes the defendants, and, answering the complaint, deny that on the 10th day of October, 1879, or at any other time, that the plaintiff was the owner, and seized in fee or otherwise, or possessed, or entitled to the possession of, the S. E. ¼ of section 14, t'p 2 S., R. 14 W., S. B. M., or any part thereof. Deny that on the day or year aforesaid, or at any other time, the defendants, or either of them, in any manner ousted or ejected said plaintiff from said premises, or any part thereof. Deny that plaintiff is damaged in the sum of $3,000, or in any sum whatever. Deny that the value of the rents, issues, or profits of said premises is $50 per month, or any other sum. Deny that by reason of the withholding alleged the plaintiff has been, or by the continuance of the withholding will be,
9 damaged in the sum of five hundred dollars, or any other amount. Deny that the defendants, or either of them, at any time are or were insolvent. Deny that they, or either of them, threatened to damage or intended to damage or injure said premises or the improvements thereon. Deny that the removal of the dwelling-house, or fences, or out-buildings, or orchards, or vineyards from said land will be any damage to plaintiff whatever. Deny that defendants, or either of them, threatened or intended or intend to fill up the well thereon or cut down the trees growing thereon, or any of them, or to commit other or great waste or injury to said premises, or that will render the judgment in this action ineffectual, or that will be of any damage to plaintiff whatever.

By way of separate defense the defendant, J. C. Haskell, alleges that he is in possession of said premises as the agent and employee of the defendant, Mrs. E. A. Fuller, and not otherwise. Wherefore J. C. Haskell prays to be hence dismissed, with his costs.

The defendant, Mrs. E. A. Fuller, by way of a separate defense,

alleges, on information and belief, that the plaintiff claims title under a patent from the United States dated on or about October 10th, 1879, said patent being based and issued upon an al-
10 leged pre-emption claim by plaintiff, wherein plaintiff alleged settlement on said land on or about December 21, 1869. That prior to the said settlement said land was selected by the State of California, by its proper agents and officers, as an indemnity school selection. Said selection was made on or about April 22d, 1868, and duly entered on the books of record of the United States land office for the land district wherein said land was situated, on said April 22d, 1868, and said selection was approved by the Secretary of the Interior of the United States on or about November 21, 1871. Said selection and approval was made under and by virtue of the acts of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights thereon, and for other purposes," approved March 3, 1853, and the other acts of Congress granting the State of California the right to select other lands in lieu of such 16th and 36th sections as were wanting or deficient in place, and to select indemnity school lands in certain cases in such acts provided.

Said selection was approved and confirmed by acts of Congress entitled "An act relating to indemnity school selections in the State of California," approved March 1st, 1877.

11 This defendant alleges that at the time of the issuance of said patent to Rufus McCreery by the United States that there was no title in or to said land in the Government of the United States, and no authority in the officers of the Land Department to issue said patent to plaintiff herein.

This defendant further alleges that the State of California issued its patent for said land to the grantor and predecessor in interest of this defendant for said land on the 4th day of March, 1874, and that under said patent this defendant and her predecessors in interest and under color of title have, in good faith, placed lasting and valuable improvements on said land prior to the issuance of said patent to plaintiff, consisting of houses, sheds, out-houses, fences, and orchard trees, of the value of over $4,000. That the defendant is entitled to the possession of said improvements.

This defendant alleges that at the time of the alleged settlement of plaintiff as a pre-emptor on said land, December 21, 1869, said land was not subject to the pre-emption laws of the United States, and was not subject thereto or to any pre-emption claim by plaintiff at any time after said date. That all the proceedings by and on behalf of said plaintiff, Rufus McCreery, under and by which he procured the issuance of his said patent, had before the Land
12 Department of the United States in the matter of his said pre-emption claim, were wholly *ex parte*, and without notice to this defendant, and without jurisdiction of this defendant; and that during the time of said proceedings this defendant was in the actual possession of said land. That this defendant was not, in any way or manner, made a party to said proceedings of plaintiff therein.

This defendant further alleges that said pre-emption entry and

patent to plaintiff was obtained by fraud and false evidence, made and filed with the local land office, and known as the pre-emption proof and affidavit of the claimant in said proceedings. That in said proof the plaintiff herein filed the testimony of two witnesses, who testified on April 5th, 1876, that said R. McCreery at that time resided on said land, and in said Affidavit "J" said McCreery testified and swore that "I now reside thereon with my family," the date of said affidavit being April 5, 1876. That said McCreery did not at that time, or at any time, since about September, 1874, reside on said land—neither did his family. That in said pre-emption proof said witnesses and said McCreery, in his said affidavit, testified that he was put off by a writ of possession issued against him. That said witnesses testified that at that date, April 5th, 1876, the
13 actual value of the improvements placed on said land by said McCreery was about $1,000 gold coin. The said evidence was false in this: That at that date said McCreery had no improvements on said land, having himself prior thereto, in 1874, removed all the improvements, except a well.

This defendant further alleges that in the district court of the seventeenth judicial district, State of California, M. Keller brought suit against Rufus McCreery, plaintiff herein, in ejectment, to recover the possession of the premises herein sued for. That said McCreery duly appeared by his counsel, and after due proceedings in said action judgment was entered by consent in favor of said M. Keller. That in said action said McCreery set up as a defense his pre-emption settlement and claim, under and in pursuance of which his said patent was issued, and that his pre-emption rights and claims were duly considered and determined in said action, and judgment entered by consent on or about July 2, 1874, in favor of said Keller and against said McCreery; and in pursuance of the stipulation in said case and said judgment, said McCreery removed all of his improvements that he desired to, and did move all except a well, and since about September, 1874, said McCreery has
14 not been an actual settler upon, or occupant of, said premises in any manner.

This defendant pleads said judgment and said action as *res adjudicata*, and further alleges that this defendant is the successor in interest of plaintiff in said action, and has been in the actual possession of said premises since October 16, 1874. Wherefore defendants ask to be hence dismissed, with their costs.

R. M. WIDNEY,
Attorney for Defendants.

Duly verified, filed, and served.

General demurrer to said answer duly filed and served & overruled by the court.

Amended Answer.

(Title of Court and Cause.)

Now comes the defendant, Mrs. E. A. Fuller, and by leave of court first had, files this amendment to her answer on her own behalf,

hereinbefore filed, and, in addition to the allegations therein contained, further alleges:

That said plaintiff settled upon the land in controversy on December 21, 1869, claiming the same under the pre-emption laws of the United States. That in March, 1873, said plaintiff offered the
15 usual pre-emption proof and affidavits, and tendered payment for said land in the proper United States land office, which proof and payment were refused by the register and receiver. That at the date of said settlement the land was within the claimed limits of the Mexican grant, Sausal Redondo, which grant had been duly confirmed by the courts of the United States for a quantity of land within certain limits, within which limits the land in controversy is situated. That the final survey of said ranch, including the land in controversy, was not approved by the United States surveyor general for the State of California until February 2d, 1875, and said survey was not approved by the Commissioner of the General Land Office of the United States until March 22d, 1875, and the United States patent for said rancho was issued on said survey March 22d, 1875, which patent excluded the land in controversy from said rancho.

Defendant alleges that by reason of said land in controversy being within the claimed limits of said rancho as aforesaid, that the said settlement of plaintiff on December 21st, 1869, and the filing of said declaratory statement, and said offer of proof and payment, were wholly void and prohibited by the said pre-emption laws of the United States, said land not being subject to said laws. That
16 said McCreery, plaintiff, left said land and removed his family and all of his improvements in 1874, and that he has never since that date had any settlement on or use or occupation of said land, and has not been an actual settler on said land at any time since September, 1874. That by reason of said settlement and residence on said land, while the same was within the claimed limits of said grant, the plaintiff initiated no rights under the pre-emption laws of the United States; and that since said land was excluded from said rancho by the approval of the final survey and issuance of the patent thereon on March 22d, 1875, said plaintiff has not initiated any pre-emption claim to said land, and has not occupied it in any manner, nor has he filed any declaratory statement therefor since that date. That since said approval of said survey, and the issuance of said patent for said rancho, and at all times since October 16th, 1874, this defendant and her husband, prior to his death in July, 1876, have been in the actual and exclusive possession of said land, having the same enclosed with a substantial post and five-board fence, having thereon a dwelling-house and improvements of the value of over $3,000, and having said land in use and cultivation, residing thereon as a home continuously. That on April 5th, 1876, the plaintiff, in *ex parte* proceedings, appeared before the United
17 States land office of the proper district, with witnesses, and made the usual pre-emption proof on said land, and in said proof said witnesses testified and swore that at that date, April 5th, 1876, that said plaintiff has resided upon the land claimed by him as pre-

emptor for more than six years last past, except about one year and one-half that he was kept off from the same by reason of a pretended and fraudulent State selection and writ of possession obtained thereby. He now resides on the land and has made improvements thereon, consisting of a house, well, corral, stables, spring-house, outbuildings, fence, and some fruit trees, and therein further testified that "the value of these improvements in gold coin is about one thousand dollars." That said evidence is false in this: That said McCreery, plaintiff, never resided on said land, except from December 21, 1869, to September, 1874, about three years and eight months. And in this, that said McCreery did not at that time reside on said land, nor at any time since September, 1874. And in this, that said McCreery did not at that time have any improvements on said land of the value of $1,000, or any other amount. And in this, that said McCreery had not been put off said land by a writ of possession of any kind.

18 That in the same proceeding said McCreery filed his own affidavit, duly sworn to, in which said McCreery deposed, referring to said land, that "I now reside thereon with my family," said affidavit being dated April 5th, 1876. That the same was false in this, that said McCreery did not then reside with his family on said land, nor at any time since September, 1874. That upon said affidavits and proof the register and receiver allowed plaintiff to make payment for the land and issued to him the usual duplicate receipt therefor. That subsequently the Secretary of the Interior disregarded said proof and payment, and treated the same as improperly made, and on May 16th, 1877, ordered plaintiff to establish his claim under the provisions of the act of Congress of March 1, 1877, entitled "An act relating to indemnity school selections in the State of California." That the land in controversy is known as an Indemnity school selection in the State of California, and was certified to the State on November 24th, 1871.

That neither at the date of said act, nor at any time since September, 1874, has plaintiff been an actual settler on said land, or any part thereof, nor was said land at any time since 1874 nor at the date of said act settled upon by any actual settler claiming any right to enter any part of said land under the homestead or

19 pre-emption laws. That the Commissioner of the General Land Office, pursuant to and under the provisions of the 3rd section of said act, established as a rule and regulation under which the claim and proof referred to in said section must be presented to the register and receiver of the district land office, which rule and regulation required that due notice of the hearing thereof must be first given to all parties in interest of the time and place of said hearing.

That this defendant and the executors of the last will and testament of Thomas Fred. Fuller, deceased, her husband, were at all times on, from and after the passage of said act, for more than twelve months thereafter in the actual use and exclusive occupation of said land as owners, and were the only parties in interest in said land, all of which was known to plaintiff herein at said time. That

no notice of any time or place of any hearing of any kind, or of any claim or proof under said act, as provided in said rule and regulation, was ever given to this defendant or said executors. That no claim of any actual settler, nor of the plaintiff, was presented to the register and receiver of the district land office, together with the proper proof of his settlement and residence, under the aforesaid rule and regulation, or under any rule and regulation which was
20 established by the Commissioner of the General Land Office, pursuant to said act. That the land in controversy is not mineral land.

Defendant further alleges that said settlement by plaintiff in 1869 was void also by reason of the land having been reserved by the prior State selection made by the proper authorities of the State of California. That the filing of the said declaratory statement was further void by reason that said State selection had been approved prior thereto by the Secretary of the Interior under the act of Congress of March 3, 1853, entitled "An act to provide for the survey of the public lands, &c.," said land having been selected by the proper authorities of the State of California under said act.

That said approval by the said Secretary of the Interior was the last act required to be performed by the Executive Department on behalf of the United States, by the provisions of law, and by said act the legal title passed from the Government, and that thereafter no further authority remained in the United States Land Department to consider the case. That all the acts of the said Department in issuing the said patent to plaintiff were subsequent to said approval, and were without authority of law, and void. That
21 plaintiff acquired no title thereby. That said approval has never been voided or annulled by the judgment of any court. That the patent to plaintiff is void, and conveyed no title to plaintiff by reason of the facts set out in the answer and in this amended answer. Wherefore defendant asks to be hence dismissed, with costs.

R. M. WIDNEY,
Attorney for Defendant.

Duly verified, served, and filed, Jan. 22, 1880.

Findings of Fact and Conclusions of Law.

(Title of Court and Cause.)

A new trial having been granted by the superior court in the above-entitled cause, said cause came on regularly for trial on the 21st day of February, 1881, before the court without a jury, a jury trial having been expressly waived by the parties, Will. D. Gould and James M. Blanchard appearing as counsel for the plaintiff, and R. M. Widney as counsel for the defendants; and the evidence on the part of both parties, plaintiff and defendants, having been closed, and the case duly submitted, the court renders the following findings of fact, to wit:

I.

That on the 10th day of October, 1879, the plaintiff was, and ever since said date has been, seized in fee and entitled to the possession of the southeast quarter of section fourteen, in township two south, range fourteen west, San Bernardino Meridian, in Los Angeles county, California.

II.

That while the plaintiff was seized and entitled to the possession of the premises particularly described in finding I, the defendant afterwards, to wit, on the aforesaid 10th day of October, 1879, without right or title, entered thereon and now withholds the possession thereof from the plaintiff.

III.

That the rents, issues, and profits of said premises are five dollars per month from the 10th day of October, 1879.

IV.

That the plaintiff has been damaged by the withholding of said premises in the sum of one hundred dollars ($100).

V.

That the defendant, E. A. Fuller, claims said land in no other way than through a patent issued by the officers of the State
23 of California to one M. Keller, and by deed from said Keller to Thomas F. Fuller, and by proceedings in the probate court in and for the county of Los Angeles, in the matter of the estate of said Thomas F. Fuller, deceased, whereby the said land was set off to said defendant, E. A. Fuller.

VI.

That said Keller, on or about the 20th day of April, 1868, made application to the State of California to purchase said land in lieu of the southwest quarter of section sixteen, township four south, range one west, S. B. M., which last land was then, and ever since has been, until after the commencement of this action, within the exterior surveyed limits of the Rancho San Jacinto Viejo, a valid Mexican grant, the final survey of which grant had not yet been made at the date of the commencement of this action.

VII.

That, in consequence of said application, the State locating agent, Leander Ransom, on or about the 22d day of April, 1868, in satisfaction of the grant of the United States to the State of California of 16th and 36th sections for school purposes, and other lands in lieu thereof, act of Congress approved March 3rd, 1853, entitled
24 "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for

other purposes," approved July 23d, 1866, entitled "An act to quiet land titles in California," and pretending to be authorized so to do by the laws of said State, selected and located the lands in question for said State in lieu of said southwest quarter of section sixteen, township four south, range one west, S. B. M., while the same was within the exterior and surveyed limits of said Rancho San Jacinto, the final survey of which grant had not yet been made.

VIII.

That, in consequence of said selection and application in last findings above, the Secretary of the Interior and the Commissioner of the General Land Office inadvertently and by mistake certified and listed the land in question to the State of California in lieu of said southwest quarter of section sixteen, township four south, range one west, S. B. M., while said southwest quarter of section sixteen was within the surveyed and exterior limits of said Rancho San Jacinto, the final survey of which grant has not yet been made.

IX.

25 That at the time said application was made by said Keller, as found in Finding No. VI, and at the time of the location and selection of the land in question, said land was claimed as a part of the Rancho Sausal Redondo, a valid Mexican grant, and the township plat of said township two south, range fourteen west, was withdrawn by the proper officers of the United States May 26th, 1868, and a survey of said Rancho Sausal Redondo made, embracing the land in question, in July, 1868. That a contest arose concerning this survey of said rancho in the United States Land Department, which was finally determined October 13, 1871, rejecting said survey, and directing the approval of the former survey, known as the Hansen survey, of said rancho, and the township plats of said township were again filed in the United States land office at Los Angeles November 24, 1871.

X.

That the plaintiff settled on the land in controversy, for the purpose of pre-empting the same, on the 21st day of December, 1869, and filed his declaratory statement therefor in the United States land office at Los Angeles, California, on the 28th day of November, 1871.

XI.

26 That said plaintiff was a duly qualified pre-emption settler, and fully entitled to the privileges of the pre-emption laws of the United States, and settled upon said tract claimed by him, the land in question, in good faith as such settler, and performed thereon all acts required by said pre-emption laws to entitle a person to pre-empt public lands.

XII.

That the land in question is agricultural land, and not mineral land, and at the time of the plaintiff's settlement thereon was uncultivated, unimproved, and u noccupied, and unenclosed.

XIII.

That the plaintiff, on the — day of April, 1876, duly received from the receiver of the United States land office his certificate of cash entry of the land in question, and on the 10th day of October, 1879, the patent for said land issued from the United States Government to said plaintiff.

XIV.

That the plaintiff's claim to said land was pending in the United States Land Department in the matter of Rufus McCreery *vs.* The State of California, from the time of his filing his declaratory
27 statement, and the State of California, and all parties in interest, were represented in an application for a rehearing in the Interior Department of the decision of the Secretary of the Interior, made March 10th, 1876, in said matter, and due and lawful notice was served upon the State, and the State of California, representing the interest of the State selection of the land in question by its properly appointed attorney, appeared in the United States land office and before the Commissioner of the General Land Office and Secretary of the Interior, in all of the contests and rehearings respecting said land.

XV.

That the evidence offered by the defendant to support the allegations contained in his answer, and amendment thereto, concerning fraud on the part of the plaintiff obtaining his certificate of cash entry and patent for said land, was all fully considered by the officers of the United States Land Department in all its details, in the matter of the pre-emption claim of Rufus McCreery *vs.* The State of California, on re-examination had in the United States land office at Los Angeles, California, and resulted in the awarding of the land in question to said McCreery, and also in determining that said McCreery was pre-emptor in good faith.

28 XVI.

That each and all the allegations of the defendant's answer, and amendment thereof, as to fraud committed by the plaintiff in proving up his pre-emption claim, are untrue.

XVI½.

That on the — day of ——, 1874, the said M. Keller entered an action of ejectment against the plaintiff herein for the land in question, alleging title in fee to said land; that on the — day of September, 1874, judgment was rendered in behalf of said Keller against

the said McCreery for the possession of said premises; that the patent above referred to in Finding No. XIII issued to said McCreery for said land subsequent to said action of ejectment.

XVII.

That after said judgment against said McCreery, as found in last finding above, said McCreery moved off from said land, under said judgment, but in no way abandoned his pre-emption claim thereto, and prosecuted the same in the Land Department of the United States with all faithfulness and diligence.

XVIII.

That the defendant, J. C. Haskell, claims no title to said
29 land, but claims right of possession through the defendant, E. A. Fuller, and in no other way than as her agent and employee.

Conclusions of Law.

As conclusions of law, the court finds that plaintiff is entitled to recover the possession of said premises, together with his costs of suit.

VOLNEY E. HOWARD,
Judge of said Court.

Filed April 6, 1881.

A. W. POTTS, *Clerk.*

Judgment.

(Title of Court and Cause.)

This cause came on regularly for trial on the 21st day of February, 1881, and a trial by jury having been waived by counsel for the respective parties, the cause was tried by the court sitting without a jury; and the evidence being closed, the cause submitted to the court for consideration and decision, and after due deliberation thereon the court files its findings and decision in writing, and orders that judgment be entered in accordance therewith.

30 Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the said Rufus McCreery, the plaintiff, do have and recover judgment of and from the said defendants, E. A. Fuller and J. C. Haskell, the premises described in the complaint, to wit:

The southeast quarter of section fourteen, in township two south, range fourteen west, San Bernardino Meridian, in Los Angeles county, California, and damages to the amount of one hundred ($100) dollars for the withholding of said premises, and the sum of eighty-five ($85) dollars, the value of rent, issues, and profits, together with said plaintiff's costs, and all disbursements incurred in this action, amounting to the sum of $128.

April 6, 1881.

V. E. HOWARD,
Judge of said Court.

Filed April 6, 1881.

A. W. POTTS, *Clerk.*

31 *Notice of Intention to Move for a New Trial.*

(Title of Court and Cause.)

To Messrs. WILL. D. GOULD and J. H. BLANCHARD,
Attorneys for Plaintiff:

You will please take notice that the defendants in the above-entitled case intend to move for a new trial in said case. Said motion will be made upon a statement of the case, including the judgment roll in said case.

Said motion will be made on the following grounds: Insufficiency of the evidence to justify the findings of fact and decision of the court, and that they are against law; errors in law occurring at the trial, and excepted to by the defendants.

April 15th, 1881.

R. M. WIDNEY,
Attorney for Defendant.

Copy received April 15th, 1881.

WILL. D. GOULD,
J. H. BLANCHARD,
Att'ys for Plaintiff.

Filed April 15th, 1881.

A. W. POTTS, *Clerk.*

32 *Engrossed Statement on Motion for a New Trial.*

(Title of Court and Cause.)

The judgment roll is hereby referred to.

This case was duly tried before the court, sitting without a jury, on the 21st day of February, 1881. Stipulations were made, and, for the purpose of this trial, the following statement shows all the proceedings had in the case bearing on the assignments and specifications of errors, to wit:

In the above-entitled cause it is stipulated between the plaintiff and defendants, for the purpose of the trial of said cause, that the facts hereinafter stated are true; but it is expressly understood and stipulated that all objections as to the relevancy, materiality, admissibility, and any and every proper and valid objection to any and every portion of said facts, may be made at the time the same shall be submitted to the court at the trial of said cause, and may at that time be fully and formally specified, stated, and made of record in the case, and may be ruled and passed upon by the court in the same manner as objections might be to the evidence if then presented to prove said facts.

33 It is further stipulated that plaintiff and defendants may offer in evidence at the trial of this cause any portion of the said stipulated facts without offering any other portion thereof; that each party may offer in evidence only so much of said facts as he may desire.

Plaintiff, to maintain his case, thereupon introduced the stipulations next marked 1st and 2nd, as follows, to wit:

1st. That on the 10th day of October, A. D. 1879, under the pre-emption laws of the United States, and the provisions of the act of Congress of the 24th day of April, 1820, entitled "An act making further provisions for the sale of public lands," and the acts supplemental thereto, a patent in the usual form issued from the United States to the plaintiff, Rufus McCreery, for the land in controversy in this action.

2nd. That on the 10th day of October, 1879, the defendants were upon said land and premises, and did oust and eject the plaintiff therefrom, and ever since that date have held, and still and now do withhold, the possession thereof from the plaintiff.

Thereupon the plaintiff rested his case.

The defendants thereupon, to maintain the issues of the defense, offered in evidence the stipulations and evidence herein re-
34 ferred to next hereafter, numbered I to XVII, as follows, to wit:

I.

That the patent to said McCreery, issued upyn the pre-emption and other proceedings hereinafter set forth.

Objected to by plaintiff, as irrelevant and immaterial, and incompetent to in any way or manner impeach plaintiff's patent, or to show fraud on the part of the plaintiff. Objections overruled by the court. Plaintiff then and there duly excepted. The same objections, ruling, and exceptions were had as to all of defendants' evidence, hereinafter set forth.

II.

That defendant, E. A. Fuller, and her husband, now deceased, resided upon said land from October 1st, 1874, until his death, and since his death she has continued in possession thereof until the present time.

III.

That list No. 1 of indemnity school selections, so far as the same pertains to the land in question in this action, is in words and figures as follows, to wit:

35 "GENERAL LAND OFFICE, *24th day of November*, 1881.

"The tracts described in the following lists have been critically examined, and are found to be free from conflict and to inure to the State for the purposes indicated.

"M. MABLY.
"JOS. J. BARNES,
"*Chief Clerk of Public Lands.*

"List No. 1 of indemnity school selections, exhibiting the tracts of public lands situated in the district of land subject to sale at Los Angeles, California, which have been selected for the support of

schools in certain townships, and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of Congress approved March 3rd, 1853, entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;' February 26th, 1855, entitled 'An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public lands, to pre-empt their settlements,' and July 23rd, 1866, entitled 'An act to quiet land titles in California.' Deficiency
36 in school lands in townships—township 4 south, range 1 west, S. B. M., S. W. ¼ of section 16, 160 acres. Selections to supply the deficiency in school lands, to which townships are entitled, S. E. ¼ section 14, township 2 south, range 14 west, S. B. M., 16 acres. No. of applications, 1,381. Date of selections, April 22, 1868.

"DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
"*24th November*, 1871.

"It is hereby certified that the tracts described in the foregoing lists are embraced in the original lists now on file in this office, of lands selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of Congress of March 3, 1853, February 26, 1859, and July 23, 1866.

"It is further certified that said tracts have been examined and compared with the township plat and tract books of this office, and that the indemnity is properly due to the townships for which selected, are found to be subject to selection, and are free from conflict; and it is therefore recommended that the list be approved, subject to any valid interfering rights which may have existed at the date of selection.

"WILLIS DRUMMOND,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR, *24th Nov.*, 1871.

37 "The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

[SEAL.] "C. DELANO, *Secretary.*"

Endorsed: Los Angeles land district. List No. 1. Received and filed 5th December, 1871. Robert Gardner, surveyor gen'l California. Duncan Beaumont, deputy. Recorded in vol. 1 of indemnity lists, pages 142 to 147. Duly certified to, &c.

IV.

That on the 4th day of March, 1874, a patent in the usual form was issued by the proper officers of the State of California, purporting to grant the land in question in this action to M. Keller.

V.

That a deed in usual form of bargain and sale, dated October 11th, 1874, was duly executed by M. Keller to T. Fred. Fuller for the consideration of $1,700, and that said deed was recorded October
38 16th, 1874, in book 31, page 543, of deeds, official records of Los Angeles county, California.

VI.

That said T. Fred. Fuller died about July, 1876, and that the defendant, Mrs. E. A. Fuller, is the widow of the said deceased.

VII.

That on December 13th, 1878, the probate court of Los Angeles county made an order in usual form purporting to set off to defendant, Mrs. E. A. Fuller, as a homestead, the land in controversy, and that said order was duly recorded in book — of deeds, of Los Angeles county, on the 14th day of December, 1878.

VIII.

That the judgment roll in the case of M. Keller *vs.* R. McCreery is in words and figures as follows, to wit:

39 In the District Court of the Seventeenth Judicial District, State of California, in and for the County of Los Angeles.

MATTHEW KELLER, Plaintiff,
against
RUFUS MCCREERY, Defendant.

Complaint in Ejectment. Fee-Simple Title.

Matthew Keller, the plaintiff above named, complaining of defendant above named, for cause of action alleges:

That on the fourth day of May, 1872, said plaintiff was seized in fee of all that certain lot of land situated in the county of Los Angeles, State of California, described as follows: The southeast quarter of section fourteen (14), township two (2) south, range fourteen (14) west, San Bernardino Meridian. That the plaintiff being so seized, the defendant afterwards, on the fourth day of May, 1872, entered into the possession of the demanded premises, and now unlawfully withholds the premises thereof from the plaintiff, to
40 his damage in the sum of $5,000. That the value of the rents, issues, and profits of said premises, from the said fourth day of May, 1872, and while the plaintiff has been excluded therefrom by the defendant, is five hundred dollars.

Wherefore the plaintiff prays judgment against the defendant for the recovery of the possession of the demanded premises, and for the sum of five hundred dollars, the value of the said rents, issues, and profits, and costs of suit.

BRUNSON & HUDSON,
Attorneys for Plaintiff.

Properly endorsed and filed, April 29, 1874.

Answer in said Cause.

(Title of Court and Cause.)

Rufus McCreery, defendant in the above-entitled action, by S. C. Hubbell, his attorney, for answer to the complaint of the said plaintiff, filed herein, says:

I.

That it is not true, as set forth and alleged in said complaint, or otherwise, that on the fourth day of May, 1872, or at any other time, the said plaintiff was seized in fee, or of any estate whatever, of all or any part of that certain tract of
41 land situated in Los Angeles county, State of California, known and designated as the southeast quarter of section fourteen (14), township two (2) south, of range fourteen (14) west, of San Bernardino Meridian. That it is not true that the said plaintiff being seized as aforesaid, the said defendant, on the fourth day of May, 1872, or at any other time, wrongfully entered into the possession of the aforesaid premises, or that he now unlawfully withholds the said premises from the possession of the plaintiff, to his damage in the sum of five hundred dollars, or in any other sum or amount whatever. Defendant denies that the rents, issues, and profits of said premises, from the said fourth day of May, 1872, to the present time, are of the value of five hundred dollars.

II.

The said defendant, for other and further answer to said plaintiff's complaint, says that he is informed and believes, and upon his information and belief so states the fact to be, that the patent issued by the State of California to the said plaintiff, and under and by virtue of which plaintiff's pretended title to the land in question is set up and maintained, was obtained by fraud and misrepresentation, in this, that there was no affidavit nor application to
42 accompany the same filed with the recorder of the county of Los Angeles, in which said land lies, as required by law; that the paper filed purporting to be an affidavit is without any statement of venue, either as to the State of California or of any county within the State, and is signed as if taken before a notary public, yet is without the impression of a notarial seal, and without any reference to a seal in the certificate of said pretended officer. Defendant further says that at the time of making the said pretended location and claim by the said plaintiff to hold the said land under the laws of the State of California the said land was unsurveyed land of the United States, and not subject to such location or appropriation. That since the said land became subject to location and appropriation under the laws of the State of California the said plaintiff has made no application to locate or claim the same, nor has he ever made the application and claim required by law.

That on or about the 21st day of December, 1869, the defendant, being then a citizen of the United States, of lawful age, and possess-

ing the qualification of a pre-emptor, settled upon the said described tract of land, then wholly unoccupied and unimproved, for the purpose of holding the same as a pre-emption right under and
43 by virtue of the laws of Congress granting pre-emption to actual settlers upon the public lands; that on or about the 28th day of November, 1871, defendant filed his declaration of intention to pre-empt said land in the proper land office of the land district in which said land is situated.

That at the date of his said settlement, and for a long time previous thereto, to wit, from, on, or about the 25th day of May, 1868, the township plat of survey of the township in which said land is situated had been withdrawn from the local land office and was not returned and filed, and said land was not in market from the time of said withdrawal until on or about the 21st day of November, 1871, when said plat of survey was again returned to said office.

Defendant further says that since his said settlement upon said tract of land, and under claim of title by virtue of his pre-emption right, and in the belief that he was the sole claimant to said land, he has made permanent improvements thereon of great value, to wit, of the value of one thousand dollars.

That his occupation and improvement of said tract of land has been open and notorious and adverse to the claim of the plaintiff, and that the plaintiff has never been in possession of said land or made any improvements thereon.

44 Wherefore the defendant prays judgment that he be hence dismissed, with his costs.

S. C. HUBBELL,
Def't's Att'y.

Filed May 19th, 1874.

A. W. POTTS, *Clerk.*

Stipulation.

(Title of Court and Cause.)

In this action it is hereby stipulated that judgment may be entered of this date for the plaintiff for the possession of the premises described in the complaint herein, but without any rents and profits or damage for the withholding the same. Execution is to be stayed on this judgment for sixty (60) days, within which time said defendant may, without molestation, remove any buildings or other improvements from said premises for his own use without further compensation therefor.

Los Angeles, June 30th, 1874.

M. KELLER,
By BRUNSON & HUDSON,
His Att'ys.
S. C. HUBBELL, *Def't's Att'y.*

Filed July 2nd, 1874.

A. W. POTTS, *Clerk.*

45 *Judgment by the Court, the Second day of July,* 1874.

(Title of Court and Cause.)

This cause came on regularly for trial on the second day of July, A. D. 1874, A. Brunson, Esq., appearing for counsel for plaintiff, and S. C. Hubbell, Esq., for the defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court, sitting without a jury. Upon stipulation within and filed with the clerk, the evidence being closed, the case was submitted to the court for consideration and decision, and after due deliberation thereon the court orders that judgment be entered herein for the plaintiff and against the defendant. Wherefore, by reason of the law and stipulation aforesaid, it is ordered, adjudged, and decided that Matthew Keller, the plaintiff, do have and recover of and from Rufus K. McCreery, the defendant, the possession of the premises described in the complaint, to wit, the southeast quarter of section fourteen, township two south, range fourteen west, San Bernardino Meridian, county of Los Angeles, State of California, together with said plaintiff's costs and disbursements in-

46 curred in this action, amounting to the sum of twenty-three $\frac{15}{100}$ dollars.

Judgment rendered July 2nd, 1874.

SEPULVEDA, *Judge.*

Filed July 2nd, 1874.

A. W. POTTS, *Clerk.*

IX.

That in July, 1868, U. S. Deputy Surveyor General Geo. H. Thompson, by order of U. S. surveyor general for California, surveyed said Sausal Redondo grant in the field; that said survey was approved by said U. S. surveyor general April 14th, 1869, and that a correct map of said survey and approval is in words and figures as follows, to wit:

(See map in original.)

47 And that all the lands embraced within said survey were claimed by the owners of said grant as being within the limits of the grant.

X.

That the Rancho Sausal Redondo is a valid Spanish or Mexican grant which was duly patented by the United States March 22, 1875, and said patent is in conformity with and includes the map in words and figures as follows, to wit:

(See map in original.)

48 XI.

That the land in controversy is included in said larger or Geo. H. Thompson survey of the Sausal Redondo grant, and is not included in said smaller or patent survey thereof, as shown in No. X above.

XII.

That the owners of said Rancho Sausal Redondo claimed all the land embraced in the said Thompson survey of July, 1868; and that both the said Thompson and the said Hansen surveys came up regularly on appeal before the Hon. the Secretary of the Interior, and were passed upon in said decision in due course of business.

XIII.

That Rufus McCreery, plaintiff, settled with his family upon the land in controversy December 21st, 1869, he having the personal qualifications of a pre-emptor. He erected a dwelling-house and other improvements thereon to the approximate value of $1,000. He continued to reside on said land until in September, 1874, at which time he removed from said land with his family because of the judgment set out in No. VIII herein.

That he at that time removed to a place with his family about three miles distant, which he bought, where he has resided
49 ever since, except as stated in McCreery's testimony in P. R. 15 herein. That the defendant, Mrs. Fuller, and her husband, under their deed of purchase shown in No. V herein, took possession of the land in controversy in October, 1874. That they fenced the land all around with a post and three-board fence, and erected cross-fences, and built a dwelling-house, costing about $1,000; also erected barn, out-buildings, and farm improvements—in all of the value of about $3,000, which improvements are now on the place. That said Mr. and Mrs. Fuller have continuously resided on the place until his death in the month of July, 1876, since when the defendant, Mrs. Fuller, has been in the possession of the place, said persons having cultivated in crops of grain said land during said time. On the — day of April, 1876, being the day before said Mr. McCreery made the proof set out in P. R. 19 herein, he, with his family, drove upon the land in controversy about sundown and staid thereon, and that night slept in his wagon, and after sunrise the next morning he drove off, all of which is fully shown in P. R. 19 in McCreery's cross-examination. Excepting said time said plaintiff has never been on said land, or had any use or occupation thereof from September, 1874, until the present.

50 XIV.

That on the 28th day of November, 1871, Rufus McCreery filed his declaratory statement number 357 in the usual and due form in the U. S. district land office of Los Angeles, California, alleging settlement upon the land in question in this action December 21, 1869.

XV.

That on the 10th day of March, 1873, said McCreery appeared in said U. S. district land office with his witnesses and offered to make payment, proof, and entry of the said land filed upon by him, and did on that day tender all legal fees and the full Government price

of said land to the register and receiver of said land office, and did deposit and file in said office the full, usual, and complete pre-emption proof, showing full compliance on his part with the pre-emption laws for said land, duly sworn to by two disinterested witnesses and said pre-emptors, before the register and receiver of said land office, and demanded the right to enter said land. That on the 8th day of April, 1873, the said register and receiver forwarded said proofs to the Commissioner of the General Land Office, with letter of transmittal, in words and figures as follows, to wit:

51 U. S. LAND OFFICE, LOS ANGELES, CALIFORNIA,
REGISTER'S OFFICE, *April 8th*, 1873.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: We herewith transmit proof offered by Geo. C. B. Selby, R. McCreery, *et als.*

Also the declaratory statement of Joseph McEvoy and James Pierce, all of which we have refused for the reason that the several tracts claimed by the said persons, as appears from the records and files of this office, was selected as indemnity school land by the State prior to the alleged settlement of said persons, respectively, and has been duly listed to the State.

Very respectfully,

ALFRED JAMES, *Register.*
J. W. HAVERSTICK, *Receiver.*

Endorsed: U. S. land office, Los Angeles, Cal., April 8th, 1873. Register and receiver transmit offers of pre-emption proof.

ALFRED JAMES, *Register.*
J. W. HAVERSTICK, *Receiver.*

Endorsed: Answer May 6, 1873. File with Los Angeles Doc. case, Matthew Keller *et al.*, for consideration therein when examined.

52 XVI.

That the certificate of purchase in usual form from the State issued to M. Keller Dec. 21, 1871, reciting payment of $200 by reason of his said pretended application of March 17th, 1868, and in satisfaction of and upon surrender of said certificate patent issued to M. Keller for the land in question, dated March 4, 1874.

XVII.

That no notices were issued in the case, except the ones referred to in P. R. 10 and P. R. 13.

Def'ts rests.

Pl'ff, to further maintain his case, offered in rebuttal the stipulations and matters therein referred to next hereafter, numbered P. R. 1 to P. R. 22, as follows, to wit:

P. R. 1.

That the only description of land on which M. Keller ever endorsed the affidavit required by the 28th section of the act of the Legislature of California, entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863, or filed in the office of the county recorder of Los Angeles county, California, in connection with his application for said land, or at all, is in words and figures as follows, to wit:

53 Original affidavit in form as prescribed in sec. 28 of act of 1863, Stat. 1863, page 600, and duly verified on 17th day of March, 1868, and endorsed on the following description of lands:

No other claim of Matthew Keller for a school location appears on file in my office.

C. E. MILES,
County Recorder.

Endorsed: Affidavit and description to accompany the application, Matthew Keller, Los Angeles county. No. —, township 2, range 14, section S. E. ¼, containing 160 acres. Located March 16, 1868. Surveyed March 1, 1868, by U. S. surveyor general.
Filed March 18, 1868.

T. D. MOTT, *Recorder,*
By S. H. MOTT, *Deputy.*

To which defendants objected, as irrelevant and immaterial under Stipulation No. XVI, and the curative act of the Legislature of California of 1872.

Ruling reserved by the court, and objection overruled be-
54 fore judgment, and not entered of record until June 7, 1881. Defendants except.
The above is designated exception No. 1.

P. R. 2.

That M. Keller prepared his application, dated at San Francisco, March 17, 1868, purporting to be an application to purchase the land in question under the said act, entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27, 1863, in lieu of the S. W. ¼ section 16, T. 4 S., R. 1 W., S. B. M., but never signed the same, except so far as signing the affidavit hereinafter referred to may be construed to be a signing of the application, which affidavit is printed on the same sheet of paper that the application is printed on. Attached to this application is an affidavit by M. Keller, made and sworn to in Los Angeles county, California, in which he swears that he is "an applicant for the purchase and location of the above-described lands." And attached to his affidavit is the affidavit of same date made by three witnesses, who do not swear that said applicant is a resident of the State, and that the lands were unoccupied by any person except the applicant, as required by section "4" of said act.

That this application and affidavits were filed in the office
55 of the State locating agent April 20th, 1868, and that by reason thereof the land was selected and located by said agent on the 23d day of April, 1868, in the U. S. land district office at San Francisco, Cal. And on the 19th day of December, 1871, the said application was approved by the surveyor general of California.

Same objection by defendant as made in exception No. 1.
Objection overruled and defendant excepts.
The above is designated exception No. 2.

P. R. 3.

That the Rancho San Jacinto is a valid Spanish or Mexican grant' situated in the county of San Diego, California, and includes the land in lieu of which the land in question was applied for, located, and selected; that said rancho was surveyed in the field by U. S. Deputy Surveyor General G. H. Thompson, Nov., 1876; survey approved by U. [S.] surveyor general for California June 2nd, 1877; the survey finally approved by the Commissioner of the General Land Office January 17th, 1880, and patented same day.

Objected to, on the ground that in this action at law no evidence can be admitted to attack the validity of the approval or certification of the land to the State of California in November, 1871, as shown in Stipulation No. III.
56 Ruling reserved by the court and objections overruled before judgment, and not entered of record until June 7, 1881. Defendants except.
The above is designated exception No. 3.

P. R. 4.

That the decision of the Secretary of the Interior, dated October 31, 1871, and the opinion of the U. S. Attorney General, dated October 23, 1871, are in words and figures as follows, to wit:

DEPARTMENT OF JUSTICE, OFFICE OF ASSISTANT ATT'Y GEN'L,
WASHINGTON, *Oct.* 23, 1871.

SIR: I have considered the appeal case commonly called Sausal Redondo. The facts are as follows:

On the 20th day of May, 1837, Juan B. Alvarado, who styled himself Governor of the Interior of the Free and Sovereign State of Alta California, in answer to the petition of Antonio Ignacio Abila, for the land known as Sausal Redondo, granted him the said tract of land in accordance with the resolution of the most excellent departmental Congress, which resolution is as follows:

There are conceded to the citizen Antonio Ignacio Abila the places of Sausal Redondo and Gauspita, which he at present occupies with his stock, without prejudice to the pasturage of the
57 cattle and horses of the community of the city, since the correspoding ejidos are not yet marked out.

2nd. That if the land referred to in the foregoing proposition

should be included within the ejidos the grantee will be subject to the payment of the corresponding tax.

Santa Barbara, May 14, 1837.

A rude map accompanies the grant, and the land is spoken of by Governor Alvarado as being within the boundaries laid down on the map.

On the fourth day of June, 1846, Pio Pico, Constitutional Governor of the Department of the Californias, after reciting that Antonio Ignacio Abila had proven to belong to him the place known as Sentinella Guaspita Salinas and Sausal Redondo, between the boundaries of Los Pales Verdes Guitierres, Los Cuerbas, La Cienega La Ballona, and the seashore, of the extent of four square leagues, a little more or less, grants him the said land under these conditions:

1st. He is to enclose it, use and cultivate it. 2d. He is to ask the judge to give him judicial possession, mark the boundaries, and place the necessary monuments. 3d. The land is in extent four square leagues, a little more or less. It is not likely that any judi-

cial possession was ever given, as no record of it is found, and
58 the grant was made after the war began between the United States and Mexico. The board of land commissioners, 19th June, 1853, confirmed Abila's claim to the land called Sausal Redondo, containing five square leagues. The United States district court for the southern district of California, at its December term, 1856, confirmed the decision of the board of land commissioners, and afterwards decided that the lands, of which confirmation are hereby made, are known by the name of Sausal Redondo and Gauspita, being the same lands granted by Juan Alvarado May 20, 1837, and situated in the present county of Los Angeles, and being of the extent and within boundaries of the map which accompanies his original petition to the Governor for said lands, reference being had for more particular description to the said original grant of said lands and said map belonging thereto, filed in this case and copied in said transcript, provided the lands contained within said boundaries do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made for such less quantity.

This decree became final by order of the attorney general
59 not to prosecute appeal. The first survey of Sausal Redondo is said to have been made by Henry Hancock in 1858, embracing five square leagues.

Surveyor General Upson, in his letter to Surveyor General Day, of 11th December, 1868, says that Hancock's survey was suspended under General Mandeville, and rejected under Surveyor General Beale.

The 8th section of the act of 23d July, 1866 (14 Stat., 220), provides that in all cases where a survey and plat of confirmed private land claims (under Spanish and Mexican title) should not be asked for within ten months after the passage of the act, the surveyor general shall set off the quantity of land confirmed by the final decree, and all lands not so set off shall be subject to the

general land laws of the United States. Pursuant to the terms of this act, the surveyor general, at the instance of Gen. W. S. Rosecrans, who paid the expenses of the survey, directed Geo. Hansen to segregate the grant to Abila from the public lands. He did so in Feb., 1868, the survey of Sausal Redondo covering about five square leagues. In the following May the owner of the Sausal Redondo filed a protest against the Hansen survey, calling the attention of the surveyor general to the fact—

60 1st. That the owners of that claim had applied to the surveyor general for an estimate of the survey under the act of 1864 (an application which the surveyor general states never reached him).

2nd. That the notice of the survey by Hansen had not been given to the parties in interest, as it seems the Commissioner of the General Land Office had directed to be done.

3d. That the segregation did not comply with the decree. In consequence of this protest Surveyor General Upson, on the 26th May, 1868, recalled the plats of Hansen from the local office and directed a survey under the act of 1864. This was executed by G. W. Thompson in July, 1868, and embraced 48,759 acres (nearly eleven square leagues—which would contain 48,825.5 acres). This is the survey now before the Department on appeal. The lands lie within a few miles of Los Angeles, and are now quite valuable. After Hansen's survey, the part of them supposed to be public lands and so set off was soon occupied by numerous settlers claiming under the title of the State of California. As the Thompson survey covers their claims, it has naturally excited great alarm and opposition.

The Thompson survey was disapproved both by the surveyor-general and the Commissioner of the General Land Office.

61 They are nearly of the same opinion as to where the northern boundary of the rancho should be, but differ materially as to the eastern line.

As to the lines of the south and west there seems to be no dispute. The award of Commissioners embraced somewhat more land than the surveyor general; just how much is not stated. The rude map which accompanied Abila's original application, and to which reference is made in the decree of the court, is of rectangular form, bounded on the north by "the lands belonging to the city of Los Angeles, on the east by the Rancho Los Cuerbos, on the south by the Rancho Guiteros, on the west by the Rancho Ballona."

There is a scale of miles attached to it. According to this scale it is said that the map measures five square leagues, and the objectors to the Thompson survey vehemently insist this was the quantity granted.

The owners of the rancho lay great stress on the last words of the decree, "provided the lands contained within said boundary do not exceed eleven square leagues, then confirmation is hereby made for that quantity, and no more, within said boundaries; but if a less quantity be contained within said boundaries, then confirmation is hereby made to such less quantity."

62 They insist that inasmuch as eleven square leagues have been found within said boundaries, they are entitled to that quantity. It is not easy to reconcile the proviso of the decree with what goes before it. The decree begins with confirming the decision of the board of land commissioners. That decision gave the claimant five square leagues.

The decree states that the lands confirmed are the same granted by Alvarado 20th May, 1837.

In Alvarado grant no quantity is specified, but Pico's grant in 1846 expressly limited the quantity to four square leagues, a little more or less. It is true that the decree makes no mention of Pico's grant, but there can hardly be a doubt that Abila asked of him the same lands he had asked and obtained of Alvarado.

How the four of Pico became five of the board of land commissioners, and their five the eleven in the proviso of the decree, is a matter of speculation, and is not shown in the case.

The decree goes on to show and describe the lands confirmed as being of the extent and within the boundaries of the map which accompanied his (Abila's) original petition to the Governor for said lands, reference being had for more particular description to
63 the said original grant of said lands and the said map belonging thereto, filed in the cause and copied in said transcript.

These words give great importance to the map referred to, and in the long and elaborate argument of counsel, as well as the decision of the surveyor general and commissioners, frequent reference is made to it.

An inspection of it is far more satisfactory than any description can be. The city lands, ejidos common, were not at the time of Alvarado's grant distinctly marked out, and the words of the grant plainly shows that *that* it was not known whether the lands granted would fall within the ejidos or not.

The 2nd clause reads: That if the land referred to in the foregoing proposition should be included within the ejidos, the grantee will be subject to the payment of the corresponding tax.

The city claimed sixteen square leagues, two leagues from the centre of the plaza, north, south, and west.

This claim has, however, been settled as covering only four square leagues, one league from the plaza towards each of the cardinal points.

The survey of Thompson goes to this limit, as determined by the courts.

The commissioners make the northern boundary of the rancho, the east and west line, two leagues from the plaza.

64 The parol evidence produced seems to indicate that at the time of the grant the ejidos were commonly supposed to extend over the whole of Abila's claim.

The case is a difficult one, after the best examination I can give it. I very reluctantly dissent from the views of the surveyor general, and also of the commissioner.

Abila, in his will, speaks of this rancho as containing four square

leagues. It is enumerated in the inventory of his effects (real and personal) as five.

The court confirmed it as within the boundaries of the map. The scale on the map makes it about five leagues. But for the last clause of the decree no question could arise as to the quantity.

Shall that cause override all the other considerations? If so, the claimants should have eleven leagues allowed them, for that quantity has been found and surveyed within the colendentes named on that map. If to this it be objected that the limit to the ejidos was not then what it is now, the answer is that there is no definite showing where they then terminated.

The map is a rectangular; must the survey be of that precise shape?

In the southeast corner there is on the map quite a large,
65 dry lake; on the southwest corner a considerable portion of the sea; must the survey go as far into the lake and sea as the map lines go? How that clause about the eleven leagues got into the decree can only be conjectured. That it got there honestly is very questionable. Had Abila lived till the survey was made we should, in my opinion, never have heard of more than five leagues being claimed. I think the Hansen survey does substantial justice between these parties, and I recommend that it be approved, and that the township plats made by him be restored.

Very respectfully,

W. H. SMITH,
Assistant Attorney General.

Hon. C. DELANO,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 31*st Oct.*, 1871.

SIR: I enclose herewith a copy of the opinion of Hon. W. H. Smith, assistant attorney general, in the matter of the survey of the California private land claims, known as Sausal Redondo. I concur in the views set forth in the opinion, and you will give
66 the order necessary to carry them into effect. The paper accompanying your letter of 28th January last are herewith returned.

I am, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

To Hon. Commissioner General Land Office:

And after said ruling and order the owner of said rancho took no further action in the premises than to file in 1872 an application under the act of Congress of July 23, 1866, to purchase the land in controversy in this matter.

Same objection as in Exception No. 1 overruled and excepted to.

The above is designated Exception No. 3½.

Plaintiff then reoffered in evidence Stipulations Nos. XII, XIV, XV.

Defendant hereinbefore set out in full,

P. R. 5.

That the township plat including the land in question was filed in the U. S. district land office April 22, 1868, and on May 26, 1868, was withdrawn therefrom by order of the U. S. surveyor general for California on account of the claim of the Rancho Sausal Redondo that the land was within the limits of said grant.

67 P. R. 6.

That on the 4th day of September, 1875, in behalf of the plaintiff and others, a motion was filed with the Secretary of the Interior in words and figures as follows, to wit:

WASHINGTON, D. C., *September* 4, 1875.

Hon. C. DELANO, *Secretary of the Interior.*

SIR: I have the honor to submit a motion of Geo. C. B. Selby *et al.* to cancel and annul the listment of certain lands in township 2 south, range 13 west, and 2 south, range 14 west, S. B. M., California, in the matter of the application of said Selby *et al.* to prove up and pay for said lands, now on appeal from the decision of the ... eneral Land Office.

It is my intention to file an argument on behalf of the appellants before the case is reached in your office in its regular order.

Very respectfully, your obedient servant,

D. A. LUCE.

Before the Hon. Secretary of the Interior.

In the Matter of the Application of GEO. C. B. SELBY *et al.* to prove up and pay for certain lands in Township 2 S., R. 13 W., and 2 S., R. 14 W., S. B. M., on Appeal from the Decision of
68 the Commissioner of the General Land Office.

Notice to cancel and annul the listment of the land to the State of California.

The undersigned, contestants of the title to the lands in dispute derived through their listment to the State, move the hon. Secretary of the Interior to revoke, cancel, and annul that listment as having been irregularly and illegally made, for the reasons hereinafter stated. They assume that in the transfer of lands from the United States to the State of California the officers of the respective land offices are the mere agents or attorneys-in-fact of those governments, with powers limited and defined by the laws under which they act. Without an extended examination of authorities in support of what we think an undeniable proposition, we will refer te a single decision of the supreme court of California as illustrative of the rigor with which they apply the rules of law to the actions of their land agents. The case is that of Hildebrand *vs.* Stewart, to be found in 41st volume of the California Reports, page 387. These contestants say that the proceedings which resulted in the listment to the State now in question are tainted from their origin to their consummation by a

disregard of law on the part of the officers of the State and
69 those for whom they acted, and by an ignorance of the facts and a misconstruction of law on the part of the officers of the United States. If we establish these propositions we confidently appeal to the judicial authority of the hon. Secretary of the Interior to annul the transactions. These transactions originated in applications by the various claimants under the State to purchase the lands in question in lieu of certain sixteenth and thirty-sixth secs. supposed to have been lost to the State by reason of certain Mexican or Spanish grants. The applications bear date in March, 1868. At that time, and at the time the applications were accepted by the State's locating agent, the lands in question were unsurveyed lands. The lines of the survey had been run in the field, but the plats of the survey had not been filed in the district land office.

It will be seen by reference to the law of California of April 1st, 1864, that the State, after much irregular legislation on the subject, had at length positively forbidden its surveyors and locating agents to accept applications for such unsurveyed lands. Thus these proceedings originated in an act not only unauthorized, but positively forbidden, nor was it a dry technical illegality; it was a contrivance by which the action of citizens seeking to pre-empt was forestalled.

70 Again, it will be seen by the 28th and 29th sections of the law of California of the 27th of April, 1863, under which these applications were made, that "no location of lands made under its provisions should give any title or interest in the land unless the person, for whose benefit the location is made, should file at the time of his application, in the office of the recorder of the county in which the land lies, a prescription of the land sought, with an affidavit described. Thus this State provided constructive notice at least to subsequent settlers of such locations as the State may have previously made, and guarded them against surprise. Now, in all these cases, the single one, we believe, of Mr. Wilkinson being excepted, the duty of giving this notice was disregarded, no description of the land located was filed, and the settlers had no notice. It will be observed that by the phraseology of the law the location is void unless the condition of notice is complied with, and that the equities of innocent parties are guarded against the State as well as individuals. We transmit along with this motion the evidence of the facts on which it rests. There are two other objections to the proceedings in question more particularly applicable to the action of officers of the United States, and which depend ex-

71 clusively upon facts contained in the records of the Land Office. At the time of these locations the lands located were claimed and known to be claimed by the grantees of the Sausal Redondo and the Tajauta, two confirmed Mexican grants. This fact was know to the land officers in that State, and the plat of the survey was only permitted to be filed in the district land office for a day or two, and until the lands thus illegally applied for were located, when the plat was withdrawn until the adjustment of the pretentions of the grantees of said ranchos. Again, the sixteenth and thirty-sixth sections, in lieu of which these locations were made,

were not ascertained to be covered by Mexican or Spanish grants at the time said locations were made.

The sixth section of the act of Congress of 23d July, 1866, provides that the determination of this fact shall be made by the final survey of the grants in question. In several of the cases now involved the final survey of the grants have not yet been made.

We respectfully submit, upon the facts thus briefly recapitulated, that the location of these lands by and their listment to the
72 State were illegal and void, and we ask that the listment may be cancelled.

MARSHALL, GOULD & BLANCHARD,
Attorneys.

And L. A. LUCE,
Of Counsel, for G. C. B. Selby, R. McCreery, et als.

Duly verified.

To which defendant objected, on the ground:

1st. That the department had no jurisdiction to entertain said motion under the facts set out in Stipulation No. III.

2nd. The motion was made without any notice to or any service of process upon the defendant herein, or any adverse party in interest, and without any appearance by any of said persons.

3d. Only the courts of the United States at the suit of the United States by the Attorney General of the United States had any jurisdiction to annul or cancel the approval and patenting of this land to the State of California, as shown in Stipulation No. III herein.

Objection overruled and defendants excepts.

The foregoing is designated Exception No. 4.

P. R. 7.

That on the 10th day of March, 1876, the Secretary of the Interior rendered his decision in the matter, in words and figures as follows, to wit:

73 DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March 10th*, 1876.

SIR: I have considered the application of Geo. C. B. Selby *et als.*, pre-emptors, to be permitted to prove up and pay for certain lands in T. 2 S., R. 13 W., and 2 S., R. 14 W., S. B. M.; also the application of James McEvoy *et als.* to be permitted to file for certain lands in T. — S., R. 13 W., S. B. M., Los Angeles district, California, all of said lands being claimed adversely by the State of California under selections made by her.

The case is before me on appeal by the said pre-emptors from your adverse decision of December 14, 1874.

It is alleged that the State selections were made in violation of law, and are therefore invalid, and no bar to the rights of the pre-emptors.

If the allegations are true, the rights of the pre-emptors must be admitted, for it is the established rule of this Department that an invalid State selection does not reserve the land it covers from appro-

priations under the pre-emption and homestead laws. See decision of March 1st, 1875, in case of Francisco Aurrecvechea *vs.* State of California *et al.* (Copps Land Laws, p. 325), of April 8th, 1872, in cases of State of California *vs.* Haile and Watson (*Ib.* p. 324),
74 and of February 5th, 1875, in case of McLain *vs.* Stanley. It appears that the selections by the State were made under the sixth sec. of act of July 23, 1866, (14 Stat., 218,) of lands in lieu of certain sections 16 and 36, which it is alleged were lost to the State by reason of being included in Spanish or Mexican grants. They antedate the claims of the pre-emptors, and for this reason alone, without considering the questions of the validity of the said State selections, you reject the pre-emption claims. You have not forwarded any data with the cases to enable me to judge of the validity of the said selections, but on an examination of the records of the proper division of your office, I find that in nearly every instance the school sections alleged to be lost to the State, and in lieu of which these selections are made, are included in the limits of a grant not yet adjusted and without final survey.

The question of the loss of such lands to the State had not been settled, for the law just quoted provides that such questions shall be determined "in case of Spanish or Mexican grants when the final survey of such grants shall have been made." The State had not lost the lands and was not entitled to select indemnity therefor.
Her pretended selections were therefore without authority of
75 law and void. She cannot be permitted to substitute other lands actually lost and thereby preserve her selections so as to defeat the claims of said pre-emptors, for such substitution would be virtually a new selection taking effect from its date.

See case State of California *vs.* Haile & Watson (Copp's Land Laws, p. 324.)

You will therefore cause careful examination af the State selections to be made, with a view of determining their individual validity, and where you find them invalid by the rule just indicated, reject the same and examine the pre-emption claims upon their merits.

In cases where persons claim the homestead or pre-emption law, and apply to enter or file upon lands covered by a State selection alleged to be invalid, they should be permitted to contest the same after due notice to the State; and if after investigation it appears that the State selections is invalid as alleged, it should be cancelled and their entries or filings be received as of the date they were offered.

I reverse your decision and return the papers in the case transmitted with your letter of August 16th, 1875.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

76 Same objection by defendant as made to stipulations P. R. 6 herein.

Overruled by the court, and defendant excepts.

The above is designated Exception No. 5.

P. R. 8.

That thereafter the following petition for rehearing of the matter was filed with the Secretary of the Interior, to wit:

In the Matter of the Application of GEO. C. B. SELBY *et al.*, preemptor, to file on certain lands in township 2 south, range 13 west, S. B. M., selected by the State of California as indemnity selections and duly listed to said State.

To the Honorable Secretary of the Interior:

On the 10th day of March, 1876, a ruling was made by the Department in the case or application of Geo. C. B. Selby *et al.*, preemptor, to be allowed to file a declaratory statement on certain lands selected by the State of California as indemnity selections, which lands have been listed to said State, and by it sold to parties who now hold the State patent therefor.

There was no argument on behalf of the State in the case, and most of the parties (all but Selby) were not represented in the case by any attorney, and were in fact not aware that the case was before the Hon. Secretary of the Interior.

77 The ruling in the above case affects or invalidates the title of the State of California and those holding from the State to several hundred thousand acres of land, worth now, with the improvements thereon, several millions of dollars.

These lands are now extensively in the hands of third and fourth purchasers, who bought relying on the facts that the lands had been duly listed to the State of California, and the patent by the State having been duly issued.

The title having been considered as settled, large sums of money have been loaned thereon by banks as well as by private individuals.

The point on which the ruling is based and which is held to be error is one the contrary of which has been held and acquiesced in by the United States surveyor general for the State of California, the State locating agent for said State, and the Commissioner of the General Land Office for over twenty years, and has been made the rule and basis of listing lands to said States as indemnity selections.

In view, therefore, of the foregoing facts and the very great interests at stake, the undersigned, as attorney for parties affected by said ruling, would respectfully ask that a rehearing be granted in said case, and that he be allowed to present an argument in be-

78 half of the validity of the title of the State to such selections.

Respectfully, etc.,

R. M. WIDNEY, *Attorney.*

Endorsed: Department of the Interior. Application for a rehearing in the matter of Geo. C. B. Selby *et als.* to be allowed to file declaratory statement on lands listed to the State of California.

P. R. 9.

That on the 18th day of August, 1876, the Secretary of the Interior rendered his decision in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 18, 1876.

SIR: The case of Geo. C. B. Selby *et als.*, pre-emptor, *vs.* State of California, was decided by me under date of March 10th, 1876, in favor of the pre-emptors.

It having been shown that the decision affected the title of the State to a very large and valuable body of land, and that the State authorities, being unaware of the pendency of the case, had failed to present any argument in support of its title, a rehearing was ordered by me, and very full and exhaustive arguments have been presented in behalf of both parties. Never doubting that all
79 selections of lands made by the State of California in lieu of the 16 and 36 sections embraced within the limits of a private grant before the approval of the survey of such grant, were irregular and not in conformity with laws, and being informed that the subject of confirming such selections was pending in Congress, I have withheld my decision in the case for the action of that body.

Congress having adjourned without legislating on the subject, it becomes my duty to dispose of the case.

It cannot be doubted, and I do not understand it to be questioned by the attorneys for the State, that the right of the State to make their selections only attaches when the final survey of the grant is made. Whether a survey is final or not can only be known when it receives the approval of the Commissioner of the General Land Office, consequently the right to select can only be exercised by the State upon such approval. Tested by this rule the selection made by the State of the lands in question were premature and irregular, and if the lists containing the same were now presented to me for approval, I should be compelled to reject the same; but I learn that the State, in many instances, has proceeded to make selections without obtaining lists from the surveyor general, and these se-
80 lections have subsequently been certified by your office and approved by this Department, and in the faith of such approval thousands of acres have been sold to *bona fide* purchasers.

On many of these lands improvements have been made by such purchasers and there value thereby becomes greatly enhanced.

From the date of the approval of these selections the lands have been treated by your office as property of the State and not subject to entry under the homestead and pre-emption laws of the United States.

Under these circumstances no settler who has gone upon the selected lands subsequent to the approval of the selections can complain that he did not have full notice of the claim of the State and of the action of this Department.

If any person entering adversely to the State has made improvements on the lands, it has been done with full knowledge that, under

the rulings and practice of your office, no entry by him would be permitted.

It is contended by counsel for the State that the approval of the selections by the Department relates back to the date of selections, and is not subject to revision, but is conclusive upon me. I am not prepared to yield full assent to this doctrine. The selection
81 was not made by any officers of the United States and could not bind the Government. It was made without authority of law, and possessed no validity until it received the approval of the Secretary. From the date of its approval it operated as a reservation of the lands from private entry, but the approval under such circumstances should not be held to relate back to the date of selection, to injury of adverse claims to the land.

In this case it appears that the township plats were filed in the land office at San Francisco, April 22d, 1868, and the greater part of the lands were selected by the State on the same day. One tract was selected May 12th, 1868, and on the 21st May, 1868, the plats were withdrawn by the surveyor general.

The plats being withdrawn from the records, it also appears that the selections were not entered up by the register. The plats remained withdrawn until November 21st, 1871, when they were filed in the Los Angeles district, within which the lands in question were then situated. In the meantime, the parties claiming under the pre-emption laws allege that they settled upon the land in good faith, without notice of any claim by the State. The selections were approved by Secretary Delano on the 24th November, 1871,
82 with the exception of S. E. ¼ 29, section 13 west, which was approved October 26th, 1872.

Selby, Wilkinson, McLain, Green, Foster, McCreery, Ketchum, Douglas, and Hand were each allowed to file D. S. for the lands occupied by them. Their filings were promptly offered in some instances before the approval of the selections, and in every instance within fifteen days after the filings of the plats, and each allege settlement long prior to November 21, 1871, though subsequent to April 22d, 1868. I cannot learn that their filings were cancelled by your office, or that any objection was made thereto, until they offered to prove up and pay for the lands, when the entries were held by you for cancellation, and the case is now here on appeal from that order.

James Pierce applied to file February 24, 1873, alleging settlement July 25, 1870; and Joseph McEvoy applied to file March 29, 1873, alleging settlement October 21, 1871.

In view of the facts above stated I am of the opinion that my decision of March 10th, 1876, should be vacated and the selections approved by this Department to the State before final survey of said grants should be permitted to stand, subject to the following qualifications:

1st. All subsisting homestead or pre-emption rights which
83 antedate the approval of the selections should be allowed priority over the claim of the State.

2d. Whenever, upon approval by your office of the survey of a

private grant, it shall be found that any section or part of section for which lieu land have been selected falls without the survey, the selections so made shall be deemed invalid, unless the State shall substitute therefor another 16th or 36th section, for which it shall then be entitled to make selections.

No further selection should be permitted in advance of the approval of the survey, and the surveyor general of California should be instructed not to furnish lists to the State of the 16th and 36th sections included within the limits of any private grant until he shall have received official information from you that the survey thereof has been approved.

Selections by the State should only be permitted upon the lists received from the surveyor general.

Applying the rules above indicated, I direct that Selby, Wilkinson, McClain, Green, Foster, McCreery, Ketchum, Douglas, and Hand be allowed to make their final proof, and upon showing full compliance with the law they be permitted to make payment and receive patents for their lands.

84 The application of Pierce and McEvoy came too late and should be rejected.

I return herewith the papers transmitted with your decision.

Respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

Defendant objected the same as to P. R. 6 herein.
Objection overruled by the court and defendant excepted.
The above is designated Exception No. 6.

P. R 10.

That on the 9th day of September, 1876, the register of said land office duly issued the following notice, to wit:

U. S. LAND OFFICE, LOS ANGELES,
CALIFORNIA, *September 9th*, 1876.

Hon. WM. MINIS, *Surveyor General, Cal.*

SIR: This office is directed by the Hon. Commissioner of the General Land Office to advise you of the decision of the Hon. Secretary of the Interior in the case of Geo. C. B. Selby *et al. vs.* State of California, adverse to the State, and directing that the various claimants thereto be permitted to make final proof and payment

85 for the following-described lands, to wit:

S. E. ¼ section 18, township 2 S., range 13 W.; S. W. ½ section 17, said township; W. ½ section 21; S. E. ½ section 20; N. E. ¼ section 29; N. ½ section 20, of said township; S. E. ¼ section 14 and S. W. ¼ section 12, of township 2 S., range 14 W.

You are therefore hereby notified that on the 13th day of October, 1876, at 10 o'clock a. m., at this office, proof will be taken in behalf of the respective pre-emption claimants to the above tracts of land,

at which time and place the State of California, through its authorized agent, will be allowed a hearing touching its claim thereto.

Very respectfully,

ALFRED JAMES, *Register.*

P. R. 11.

That the surveyor general of California issued the following appointments, to wit:

SACRAMENTO, *September 26th*, 1876.

Hon. R. M. WIDNEY.

DEAR SIR: In the case of Geo. C. B. Selby *et al. vs.* State of California, the register of the U. S. land office for the Los Angeles land district, in compliance with the instructions of the Hon. Commissioner of the General Land Office, has notified this office that proof would be taken in behalf of the respective pre-emption claimants to the following-described land, viz: S. E. ¼ section 18, township 2 S., range 13 W.; S. W. ¼ section 17; W. ½ of N. W. ¼ section 21; S. E. ¼ of section 20, and N. E. ¼ section 29, and N. ½ of section 20, township 2 S., 13 W., S. B. M.; S. E. ¼ of section 14, and S. W. ¼ section 12, township 2 S., range 14 W., S. B. M., on the 13th day of October, 1876. You are hereby appointed as the authorized agent of the State of California to appear for the State in all of the above contested cases.

86

Very respectfully,

WM. MINIS,
Surveyor General.

P. R. 12.

That on the 29th day of October, 1876, the following answer was filed in said U. S. district land office, to wit:

U. S. LAND OFFICE,
LOS ANGELES LAND DISTRICT, STATE OF CALIFORNIA.

R. MCCREERY, Pre-emptor, *vs.* THE STATE OF CALIFORNIA.

Answer by the State of California, S. E. ¼ section 14, township 2 S., range 14 W., S. B. M.

Now comes The State of California, by R. M. Widney, its attorney, and appearing on its own behalf, and not otherwise, and, in answer to the notice of the hon. register of the U. S. land office at Los Angeles, California, dated the 9th day of September, 1876, hereto attached and made part hereof, alleges:

87

First. That by section 7 of the act of Congress of March 3d, 1853, relating to pre-emption claims in the State of California, there was granted to said State, absolutely and unconditionally, the right to select, by the proper authorities of the State, other lands in lieu of such sixteenth and thirty-sixth sections as are taken by private claims, which selections were subject to no other conditions than approval by the Hon. Secretary of the Interior.

Second. That on the 23d day of April, 1868, the S. E. ¼ of section 14, township 2 south, range 14 west, S. B. M., was unoccupied Gov-

ernment land, to which there was no adverse claim, and subject to selection by the State.

That the State, by its proper authorities, the State locating agent, selected said lands on said 23d day of April, 1868, in lieu of the southwest ¼ section 16, township 4 south, range 1 west, S. B. M.; which lieu was taken by a private claim, to wit, the Mexican grant, San Jacinto, in San Diego county, California, granted by the authorities of the Mexican Government to M. de Aguirre, finally confirmed by the U. S. district court day of December 24th, 1855.

88 Third. That said selection was made by and with the consent of the register of the U. S. land office, endorsed in writing on the selection by the State, in triplicate, one of which was filed in said local land office April 23d, 1868, one forwarded to the General Land Office, at Washington, and duly filed therein, and one returned to and filed in the State locating agent's office. All which have ever since remained on file in said offices, open to the public inspection, and furnishing to the public due and full notice, under the U. S. laws, of said selection by the State, and of the rights of the State in the premises.

Fourth. That said selection by the State was approved by the Secretary of the Interior November 24th, 1871, in writing, duly endorsed on the list of said land, which approved list was in triplicate, one remaining on file in the Department, at Washington, one being filed in the local land office wherein the land is situated, and one was delivered to the proper authorities of the State of California on or about the said 24th day of November, 1871, each being public notices of the rights of the State of California to own and sell said land.

89 Fifth. That upon receiving said approved lists, the proper authorities of the State of California duly and in good faith, and without notice of any adverse claim, and for a valuable consideration, to wit, $200, sold said land to M. Keller, and on or about the —— day of December, 1871, issued its certificate of purchase, and for one year thereafter withheld its patent, to give opportunity for adverse claims to be presented; that no notice of any such claim being given to the authorities of the State, the State issued its patent to said M. Keller, * * * dated the 4th day of March, 1874. That since said date the State has claimed no title to said land, having conveyed the same to said M. Keller.

Sixth. That on said twenty-third day of April, 1868, said register of the U. S. land office for the land district in which said land was situated duly entered in the proper books of record of his office said selection of said State and his said approval thereof.

That said books have ever since remained open to public inspection, and were due and legal notice to all parties of the said selection of said land by the State, and the approval thereof.

Seventh. That the records and files herein referred to were full and legal notices to all parties seeking homestead or pre-emption claims of the right and ownership of the State of California.

90 Eighth. That under section 6 of the act of Congress of March 3d, 1853, relating to pre-emption claims in California,

and section 2271 Revised Statutes, said land by said selections of the State of California on April 23d, 1868, was withdrawn from the pre-emption and homestead laws of the United States, and was not subject to settlement by said pre-emptor on the 21st day of December, 1869.

Ninth. That the alleged settlement and pre-emption claims of said R. McCreery, on or about the 21st day of December, 1869, is and was with full notice of the right of this State aforesaid, and is and was unauthorized by law, and is void.

Tenth. That the authorities of the State never had any notice whatever of said pre-emption claim or settlement, or of the filings or offer to file a declaratory statement by said persons until long after this State has sold said land to said M. Keller, and issued its patent therefor. That said notice to this State was dated the 9th day of September, 1876, a copy of which is hereto attached.

Eleventh. That the authorities of the State never had any notice of trial or opportunity to introduce evidence relating to the said decision of the Secretary of the Interior of March 10th, 1876, or of August 19th, 1876.

91 That said proceedings were *ex parte* and without jurisdiction on the part of the Department of the Interior as against this State, the State not having been made a party thereto.

Twelfth. That said claimant was and is disqualified as a pre-emptor by reason of his having executed a mortgage on said land dated the —— day of ———, 187–.

Thirteenth. That said McCreery is not in possession of said land, and has not occupied the same since the 2d day of July, 1874.

Wherefore the State of California asks that said pre-emption claim be denied and cancelled as illegal and without right, and that said case be set for trial for a day certain.

THE STATE OF CALIFORNIA,
By R. M. WIDNEY,
Attorney for said State by special appointment herein filed.

ALFRED JAMES, *Register.*

U. S. LAND OFFICE,
LOS ANGELES LAND DISTRICT, STATE OF CALIFORNIA.

RUFUS MCCREERY *vs.* STATE OF CALIFORNIA.

Southeast ¼ section 14, township 2 south, range 14 west, S. B. M.

Hon. Register and Receiver.

GENTLEMEN: Take notice that in pursuance of the accom-
92 panying appointment by the State of California I hereby enter an appearance on behalf of said State in the above-entitled cases.

August 27th, 1877.

Respectfully,

R. M. WIDNEY,
Attorney for the State of California.

P. R. 13.

That on the 28th day of June, 1877, the said register and receiver duly issued the following notice, to wit:

U. S. LAND OFFICE, LOS ANGELES, CAL., *June 28th*, 1877.

Hon. WM. MINIS, *Surveyor General, California.*

SIR: You are hereby notified that, under direction of the Hon. Commissioner of the General Land Office, that a hearing will be had at this office on the 25th day of August, 1877, commencing at 10 o'clock a. m., in the matter of the cash entry of Rufus McCreery for the southeast ¼ of section 14, township 2 south, range 14 west, San Bernardino meridian, at which time and place you will be allowed to offer proof and cross-examine witnesses touching the claim of the State of California to said tract.

(Copy.) ALFRED JAMES, *Register.*
J. W. HAVERSTICK, *Receiver.*

93 P. R. 14.

That on the 27th day of August, 1877, the following notice and appointment was filed in said land office, to wit:

STATE OF CALIFORNIA,
OFFICE OF SURVEYOR GENERAL,
SACRAMENTO, 18*th July*, 1877,

Hon. R. M. WIDNEY.

DEAR SIR: Having been notified by Alfred James, register of the United States land office of Los Angeles land district, California, that a hearing would be had in the following cash entry of Rufus McCreery for southeast ¼ of section 14, township 2 south, range 14 west, S. B. M., as per accompanying copy of said notice, you are hereby appointed to represent the State at such hearing.

Yours respectfully, WM. MINIS,
[SEAL.] *Surveyor-General.*

P. R. 15.

That thereafter the following proceedings were had and evidence taken in said United States district land office, to wit:

RUFUS K. MCCREERY *vs.* STATE OF CALIFORNIA.

Case called at 10 o'clock a. m., Monday, August 20th, 1877, all parties present; Gould & Blanchard appearing on behalf of the claimant, Rufus K. McCreery, and R. M. Widney, on the part of the State.

94 By consent of counsel on both sides, case continued until Monday, August 27, 1877, at which time Messrs. Gould & Blanchard appearing on the part of the claimant, R. K. McCreery, R. M. Widney files written appearance on the part of the State by copy of notice to the State, copy of authority from Hon. Wm. Minis, surveyor general of the State of California, and written notice of appearance.

Counsel for R. McCreery objects to the appearance of R. M. Widney or any other person on behalf the State, for the reasons—

First. That the surveyor general has no authority to appoint R. M. Widney or any other person as attorney in this case to appear on behalf of the State of California.

Second. That the application to the State for this land was illegal, fraudulent, and void, the selection of the same collusive and void, and the listing of the land to the State was by inadvertence and mistake, and without authority of law and void. The State having no title has no right to appear in any way as a party to this cause.

The invalidity of the claim of the State was established by a prior Secretary of the Interior, and has since been established by the
95 decisions of the court. An invalid State selection is void for all purposes, and no bar to pre-emption rights.

Third. The appearance of Mr. Widney in the case tends only to delay and impede the progress of the case and cause unnecessary expense.

J. W. HAVERSTICK, receiver, called on the part of R. K. MCCREERY:

Question. Do you know the claimant, R. K. McCreery, who filed D. S. N. upon the southeast ¼ section 14, township 2 south, range 14 west, S. B. M.?

Answer. I do.

Q. State what you know as to his attempt in 1873 to make entry of this land.

A. Mr. McCreery with others, accompanied by their attorney, B. B. Newman, came to this office in February or March, 1873, and offered to make proof and payment for their respective claims.

Q. Did the register and receiver of this office decline to allow the entries and give each of them a certificate or memoranda rehearsing the facts in the matter?

A. They did, from the fact that the various tracts covered by them D. S. was also covered by approved State selections. Certificates were given them reciting these facts.

Q. Was the indemnity State selection the only cause that
96 prevented at that time the entry of this tract by R. K. McCreery?

A. Yes.

ALFRED JAMES, register, called on the part of R. K. McCreery:

Q. Are the facts above written in the testimony of J. W. Haverstick, receiver, true, of your own knowledge, and was such testimony duly forwarded to the Department?

A. They are. Such testimony was forwarded.

Counsel for State moved to strike out the evidence herein given, both of the register and receiver, as to tender of proof and payment, on the ground that it is incompetent.

Cross-examined:

Q. Were not the tender of proof and payment in 1873, and all proceedings by the said McCreery from the filings of the D. S. down

to September, 1876, without notice to the State or any one else, and wholly *ex parte* by him?

Objected to by counsel for McCreery, on same ground as before; and further, that it is wholly irrelevant.

A. They were.

Redirect examination:

Q. Was not the Governor of California duly notified by you, under the Co[m'r] decision in this case, dated March 20th, 1876, to relinquish the claim of the State to this land, and had not all
97 the instructions of the Department been fully complied with by this office in the matter in every regard?

A. The Governor was notified at that time, and all the instructions of the Department in this, as well as other of the Selby cases, were fully complied with.

Recross-examined:

Q. At what time was the Governor notified, as you have above stated?

A. October 13, 1876.

Q. Did he make any such relinquishment, that you know of?

A. He did not.

Counsel for McCreery now offer as explanatory of the register's statement of the demands of the Governor for the relinquishment of this tract letter-book copy of said demand from the Government, marked "Exhibit I, McCreery."

Counsel for McCreery also offered, by reference thereto, and for the purpose of showing the form and recitals in the memorandum or certificate given to Mr. McCreery in 1873, by the register and receiver of this office at the time, he offered to make entry of this tract, like the certificate or memorandum filed in the cases of Green, Selby, Wilkinson, and Hand and Ketchum, all of said cer-
98 tificates being similar in form, and given for like purposes. The original given to Mr. McCreery being mislaid or lost, or on file in the Department, and ask that the same be considered in connection with the oral evidence herein of the facts therein stated, and especially that Mr. McCreery did, at that date, tender proof and offer to make payment for and entry of this tract in February or March, 1873. And for convenient reference file copy of like with cert. or memarandum issued to J. W. Douglas, one of the claimants in the Selby case, marked "Exhibit 2, McCreery."

Objected to by counsel for State, as incompetent.

F. O. WILKINSON called and sworn on the part of R. K. McCreery:

Q. State your name, age, and occupation.

A. My name is Francis O. Wilkinson; age, 28 years; occupation, farmer.

Q. Do you know R. K. McCreery, who filed his D. S. upon the the southeast ¼ section 14, township 2 south, range 14 west, S. B. M.,

on or about November 28th, 1871, and who is the claimant in this trial.

A. I do.

Q. How long have you known him?

A. I knew him before he went on the land.

Q. Is he a citizen of the United States?

99 A. He is.

Q. Is he the head of a family?

A. He has a wife and children.

Q. Do you know this land claimed by him under the pre-emption laws of the United States?

A. I do.

Q. What is the character of it?

A. Agricultural.

Q. About how far have you resided from it from many years?

A. About three miles.

Q. In the same valley, or on the same plain, is it not?

A. Yes; it is in the same valley.

Q. When did Mr. McCreery enter and settle upon this land?

A. Some time in the fall or winter of 1869. I do not know exactly what time he went there.

Q. For what purpose?

A. For farming.

Q. Did he, within your knowledge, leave land of his own to settle on this?

A. He did not, within my knowledge.

Q. Is he the owner of 320 acres of land, or was he the owner of 320 acres in 1873, in any of the States or Territories of the United States to your knowledge?

A. He was not, to my knowledge.

100 Q. Has he made any contract, either directly or indirectly, by which the title he has or may acquire from the United States should inure to the benefit of any person or persons except himself.

A. He has not that I know of.

Q. What improvements did he put upon the land beginning at the time of his settlement there in 1869.

A. He built a house, stable, corral, chicken-house, planted some trees and bored an artesian well.

Q. What was the value of these and other improvements that he had on the land, in gold coin, from the time he settled there in 1869 until he offered to make entry of this land in 1873?

A. I should think they were worth from $1,200 to $1,500.

Q. Did Mr. McCreery during all that time reside on the tract with his family?

A. Yes; he did.

Q. State what cultivation there was of this tract by the claimant, Mr. McCreery?

A. I think he cultivated some 70 or 80 acres of it in barley.

Q. Did he have any teams or stock on the place?

101 A. He had some 50 or 60 head of cattle, some horses and wagons.

Q. Farming tools. chickens, etc.

A. He had.

Q. During the time from the settlement on the tract by Mr. McCreery in 1869, until he offered to prove up and make entry of this land in February or March, 1873, was there any adverse occupation or cultivation of this land by other parties?

A. There was not.

Q. Have you any interest in the land?

A. I have not.

Cross-examined:

Q. Do you know whether there was a house on this land before Mr. McCreery went there?

Objected to by counsel for McCreery, on the same grounds as objections to the appearance of Mr. Widney in the case; and, second, that it is not cross-examination or responsive to the examination-in-chief; third, that it is irrelevant and immaterial.

A. I believe there was.

Q. Was it built by other persons than McCreery?

Same objection as before.

A. I think it was.

102 Q. Did not Mr. McCreery take away all of his improvements from this land, except the well, in 1874, and dig up his trees and cut them down?

Same objection by counsel for McCreery as before, and—

Second. It pertains to a date subsequent to 1873, when the right of the claimant McCreery to this land vested absolutely and subsequent to the judgment of the court under which he was dispossessed of this tract.

Third. That it is irrelevant and immaterial, and a ruling is asked by the R. and R.

Objection overruled by R. and R.; counsel for McCreery objected to the ruling.

A. They were taken away, but by whom I do not know.

Q. Has Mr. McCreery been an actual settler or resident upon or occupant of this land since some time in 1874?

Same objection as before by counsel for McCreery, and ruling asked by the R. and R.

Objection sustained by R. and R. on the ground of irrelevancy, and that settlement since 1873, the time he made his proof and payment, is irrelevant.

A. There was about a year and a half of that time that he was not there.

Q. Has Mr. McCreery been a settler or actual occupant of or resident upon this land since January, 1877?

103 Same objection as before by counsel for McCreery, and ruling by R. and R. asked.

Objection sustained by R. and R., as before.

A. He has not.

FRANCIS O. WILKINSON.

Subscribed and sworn to before me, this 27th day of August, A. D. 1877.

ALFRED JAMES, *Register.*

J. H. SNYDER, called and sworn on the part of R. K. MCCREERY:

Q. State your name, age, and occupation.

A. My name is J. H. Snyder; age, 50 years; occupation, farmer.

Q. How long have you know R. K. McCreery, the claimant in this case, who settled on the S. E. ¼ sec. 14, township 2 S., range 14 west, S. B. M., and filed his D. S. thereon on or about November 28th, 1871?

A. I have known him since 1869.

Q. Is he a citizen of the United States?

A. He is.

Q. Do you know the land claimed by him?

A. I do.

Q. How far from it do you reside with your family?

104 A. I haven't any family. I reside about half a mile. My land adjoined on that at that time.

Q. How long have you resided there?

A. I have resided there since 1868.

Q. What is the character of the land—mineral or agricultural?

A. Agricultural.

Q. When did Mr. McCreery settle upon it?

A. As well as I can recollect, it was in 1869—the latter part of 1869, I think.

Q. And for what purpose?

A. For the purpose of farming and making a home, as he said.

Q. What was the condition of the land at that time?

A. The land lay in commons. It was like all pasture or wild land.

Q. Was any portion of it cultivated when Mr. McCreery settled there in 1869?

A. No; it never had been as I could see.

Q. Was there any wild mustard growing upon it?

A. Yes, sir.

Q. Did Mr. McCreery within your knowledge leave land of his own to settle on this?

A. No, sir; not to my knowledge.

Q. Is he the owner of 320 acres of land, or was he in 1873,

105 in any of the States or Territories of the United States to your knowledge?

A. He was not.

Q. Has he made any contract, directly or indirectly, with any

person or persons whosoever by which the title which he has or may acquire from the United States should enure to the benefit of any person or persons except himself?

A. He has not to my knowledge.

Q. From the time that Mr. McCreery settled on this land in 1869 until he tendered proof and offered to make payments and entry of this tract in February or March, 1873, what buildings or improvements did he put upon it?

A. He built a house, stable, and corral, garden and well-house, I think were the principal improvements.

Q. What was the value of these improvements in gold coin?

A. Oh, I should judge $800 or $1,000; I should judge they cost that; it may be more or less.

Q. During all that time where did he reside with his family?

A. He resided there in the house he built.

Q. On this tract?

A. Yes.

Q. How much of the tract did he cultivate, and in what?

106 A. I cannot say how much of the tract he did cultivate. He had some corn and barley.

Q. Did he have any team or stock upon the place?

A. Yes, sir; also hogs and chickens.

Q. Was there any adverse occupation or cultivation of this land by other parties during all that time?

A. No, sir; not to my knowledge.

Q. Have you any interest in this land?

A. No, sir.

Cross-examination waived.

J. H. SNYDER.

Subscribed and sworn to before me, this 27th day of August, A. D. 1877.

ALFRED JANES, *Register.*

R. K. McCREERY called and sworn in his own behalf.

Q. Are you the identical person who filed D. S. No. 367, November 28, 1871, alleging settlement December 21, 1869, upon the S. E. ¼ sec. 14, township 2 S., R. 14 W., S. B. M.?

A. I am.

Q. Are you a native-born citizen of the United States?

A. Yes, sir.

Q. How old are you?

107 A. I am 52 years old, or will be in October next.

Q. Are you the owner of 320 acres of land in any of the States or Territories of the United States, or was you in 1873?

A. I was not.

Q. Did you settle upon and improve said land not to sell the same on speculation, but in good faith to appropriate it to your own exclusive use and benefit?

A. I did, sir.

Q. Have you made any contract or agreement in any way or manner with any person or persons by which the title which you have or may require from the United States will inure to the benefit of any person or persons except yourself?

A. I did not, sir.

Q. Have you heretofore had, except in your entry of this land, the benefit of the pre-emption laws in any of the States or Territories of the United States?

A. No, sir.

Q. When did you settle on the land?

A. About December 20th, 1869.

Q. Did you have a family at that time with you; a wife and three children?

A. Yes, sir.

Q. For what purpose did you settle on there?

108 A. To make a home for myself and family.

Q. And with the intention of pre-empting the land, did you not?

A. I did, sir.

Q. What is the character of the land?

A. Agricultural.

Q. When you settled there in 1869, were there any fences upon or around any portion of it?

A. No, sir.

Q. Or settlement or cultivation thereon?

A. I don't think there had ever been a plow stuck in it, at least it did not show it.

Q. Was there any settlement or any person residing thereon?

A. No, sir.

Q. What was the condition of the land at that time?

A. Wild land, I suppose I should call it; I don't know what else to call it.

Q Was there a large amount of wild mustard growing on it?

A. Oh, yes; there was about 30 or 40 acres.

Q. What improvements did you put thereon during the time you have mentioned, beginning with your settlement in 1869?

A. A house, barn, corral, spring-house, chicken-house, well, and fence.

Q. What kind of a well?

A. An artesian well—a flowing well.

109 Q. What was the value of those improvements?

A. I should think from $1,000 to $1,200.

Q. Describe your cultivation of this tract during said time, beginning with the first year.

A. In the spring of 1870 I plowed 14 or 20 acres; the next I plowed about 40 acres; in all, I think there was about 70 acres.

Q. In what did you plant and sow this plowed land?

A. In corn and barley.

Q. During these years what stock did you have upon the tract?

A. 4 or 5 horses, from 20 to 50 head of cows, and hogs and chickens.

Q. During those years was there any adverse occupation or cultivation of the land by other parties?

A. No, sir.

Q. State what you did in this land office in 1873, in reference to this tract, in February or March of that year.

A. That was when I offered my money to prove up; tendered my proof and money.

Q. Did you at that time come to this land office with your witnesses and tender the full payment for this land, together with all legal fees and commissions, and offer to make proof and payment for and entry of this tract?

Objected to by counsel for State, as incompetent.

Same protest to objection as before.

A. I did.

Q. Did the register and receiver give you a memorandum or certificate in form similar to the certificate or memorandum is-
110 sued to J. W. Douglas, F. O. Wilkinson, M. Green, and others of the Selby claimants?

Objected to by counsel for State, as incompetent and irrelevant. Same protest to objection as before. (The original paper, of which "Exhibit 2," McCreery, is a copy, here shown to the witness.)

A. Yes, sir.

Q. Do you know were it is?

A. I do not. It has been mislaid, or I have given it to some attorney. But I had one like that in form.

Q. How long had you been upon this tract after your settlement in 1869 before Matthew Keller notified you that he claimed this tract as a school or indemnity State selection?

A. Over two years.

Q. Did said Matthew Keller bring suit of ejectment against you in the district court of the 17th judicial district of the State of California, in and for the county of Los Angeles, in which complaint was filed about April 29th, 1874?

Objected to by counsel for State, as not the best evidence. Same protest to objection as before. Counsel for R. K. McCreery here offers in evidence certified copy of the complaint, answer, stipulations, and judgment in the case of Matthew Keller *vs.* Rufus K. McCreery, the claimant herein, to be marked Exhibit 3, McCreery.

Q. At the time this judgment was filed in said court, July 2, 1874, what improvements did you have upon the tract, and where was you residing with your family?

111 A. On this tract of land I had the same improvements to which I have testified before—they were all there.

Q. Please repeat them.

A. A house, barn, corral, spring-house, chicken-house, and a well and fencings.

Q. There was a privy?

A. Yes, sir; there was a privy.

Q. How much stock did you have there at that time?

A. I suppose I must have had in the neighborhood of 40 or 50 head of stock, all told.

Q. Was that your only home?

A. That was all I had in this country.

Q. The only home you had upon the earth, was it?

A. That was it, sir.

Q. At any time after you settled on this land in 1869, did you ever relinquish or abandon your claim to this tract of land?

A. I did not, sir.

Q. Who paid the taxes during the time mentioned, and after the judgment of the court ejecting you from these premises?

A. I did, sir.

Q. State the facts about the little shanty or house mentioned by the witness, F. O. Wilkinson, in this case. State all about it.

A. When I settled on this piece of land there was a small cabin on one corner. After I was there about a week there was a man came to me and said to me that I had jumped his land. I told him as he had not complied with the laws I considered I had as good a right there as he. He told me that he did not consider it worth a
112 damn, and that if I would buy his cabin he would sell it to me. He asked me $20 for the cabin. I think I gave him $15. I then moved the cabin up to my house.

Q. Had any one lived in this little house or cabin, and what was the appearance around it when you went there?

A. I do not think any one had ever stopped over night in the cabin; there was no signs of fire, and the little blocks that had been sawed off still remained there.

Q. Was the mustard grown up around it?

A. No, sir; it was down on the cienega or grass land.

Q. And you bought this little house of the man who built and claimed it, or caused it to be built?

A. I did; and paid him the money for it.

Q. Describe this little house as to size, and how it was set up; give a description of it.

A. The size of it was about 7x9 feet, made of boards up and down, and covered with shakes.

Q. Was it built of rough boards?

A. Of rough boards.

Q. And set upon blocks at that?

A. Well, it might have possibly been set on boards laid flat-ways, probably one little piece set across another.

Q. It was not fastened to the soil, was it?

A. The high part of it was made in shanty form. In the highest part the two posts went into the ground and two on blocks.

Q. How did you move it?

A. Mr. Snyder, his man, my family and myself put it on the wagon, and I hauled it up.

113 Q. Then this was the only improvement of any kind on the tract when you went there, was it not?

A. This was all that could be seen, sir.

Q. Did you not sleep upon this land the night before you made entry thereof in 1876, and have you not continually claimed the same as a pre-emption right?

A. I myself remained on the place the night before I proved up in 1876, and have claimed it up to the present time.

Cross-examined:

Q. Where is the man you bought that house of now?

A. I could not say; I have not seen him for four years.

Q. Dead, is he not?

Same objection as before.

A. I could not say, indeed, sir.

Q. About what time in the evening or night did you go upon the land in 1876 when you slept there?

A. As soon as I was done my supper.

Q. About what hour did you go upon the land?

Same objection as before.

A. Well, it was not dark when I left home; I could not be able to say; I am not prepared to say what time exactly to the hour.

Q. Was it after sundown?

A. Yes, sir; between sundown and dusk.

Q. Did you leave about sunrise the next morning?

Same objection as to the appearance of Mr. Widney in this case; second, that it is irrelevant and immaterial, as it was not necessary for him to go upon the land at all at that time.

A. Yes, sir.

114 Q. And took away everything with you that you took the evening before?

Same objections.

A. I did.

Q. You took no provisions or cooking utensils with you, did you?

Same objection as before.

A. I think we took some things to eat and drink both.

Q. What cooking utensils did you have?

Same objection as before.

A. None, sir.

Q. You stopped out in the open air on the place, did you not?

A. No, sir; we had a covered wagon.

Q. In which you slept?

A. Yes, sir.

Q. Did you not go through a fence in going on the land at that time that you opened or broke down?

Same objection as before.

A. I drove through a place that was opened in the fence.

Q. Opened by some one of your party, was it not?

Same objection as before.

A. I could not say, sir; I did not see it opened.

Q. At that time there was a family living on the place and claiming it adversely to your claim, was there not?

Same objection as before.

A. There was a family stopping there.

Q. Since you left that morning have you been residing on the land or occupying it with your family?

Same objection by counsel for McCreery as above, and ruling by R. and R. is asked, the question being irrelevant and not cross-examination.

Objection sustained by R. and R., on the ground of irrelevancy.

A. I have not, sir.

115 Q. Did you not, in 1874, after the date of this judgment, offered in evidence here, take away all your improvements and cut down the trees which you had there, leaving only the well, and did you not fill the well up?

Same objection as before, as not responsible to examination-in-chief, as irrelevant and immaterial, and ruling asked by the R. and R. therein.

Objection overruled by R. and R.

Counsel except to the ruling.

A. No, sir; I did not; I never cut a tree down on that place in my life; I never filled up the well.

Q. State all that you did take off.

Same objection as before.

A. I took off all the buildings I had put on.

Q. What did you leave on the place that you had put there when you went away?

A. I left an artesian well and some trees.

Q. State what became of the trees and the well, as to its being filled up.

Same objection as before, and a ruling by R. and R. is asked.

Objection sustained by the R. and R., as irrelevant.

A. The trees, one of them I saw standing there for a year after I left; what became of it afterwards I cannot tell; the artesian well, Fogel's boy was allowed to water his stock there; this is hearsay; I heard that he put down bricks and bottles into the pipe; the well was flowing when I left, and I knew it was flowing last year even.

116 Redirect examined:

Q. Was it not under this judgment of the court of Keller *vs.* yourself, Exhibit 3, herein, that you was compelled to give up possession of this land?

A. For no other sole purpose than that.

Q. Did you not continue to notify thereafter all persons who came upon the land to occupy or possess the same, that the land was yours and your claim thereto still pending before the Land Department?

A. I did notify the parties that bought it when they came to see me, that they had better go slow, for they might possibly lose their money. Their answer was to me that I was off the land and would give them no more trouble.

Q. You distinctly notified them that you still claimed the land?

A. I told them so, and of course when I paid the taxes on the land, that was sufficient.

Q. Has Mr. Keller, who ejected you from this land, ever resided on it at all?

Objected to by counsel for State, on the ground that it is irrelevant and not redirect examination and immaterial, and a ruling asked by R. and R.

Same protest as before.

Objection sustained by R. and R.

A. No, sir; not within my knowledge.

Q. Who was your attorney in this case of Keller *vs.* you?

117 Objected to by counsel for State, as irrelevant and immaterial.

Same protest to objection as before.

A. Mr. Hubbell.

(Stipulation in Exhibit 3, McCreery, here shown witness, signed by M. Keller, by Brunson & Hudson, his attorneys, and S. C. Hubbell, defendant's attorney.)

Q. Was you ever informed before to-day of the contents of that stipulation, or even that there was a stipulation in that lawsuit before to-day?

A. Not to the best of my knowledge, only I knew that I had 60 days to remove anything if I wished to.

Q. Mr. Hubbell, your attorney, so informed you, did he not?

A. He did, sir.

Q. Did not Mr. Hubbell advise you to submit to the judgment dispossessing you from this land and take no appeal, and did you not confide in his advice as a lawyer, and submit thereto, as you supposed you was compelled to, until you had obtained your rights in the Land Department?

A. He did, sir; and told me I had better take those things, than to have nothing. Of course I placed all confidence in the man, supposing he knew more about it than I did, and believing he was correct.

Q. Is not the only reason that you have not continued in the occupancy of this tract, and to cultivate and improve the

118 same, this judgment of Keller *vs.* you, and the fear of being put in jail for contempt of court thereunder should you return to stay on this tract with your family permanently before the matter is fully adjusted in the Land Department?

A. Yes, sir.

Recross-examined:

Q. You know that a judgment was entered up in that case in 1874, without your being present in court with witnesses and having a trial, did you not?

Same objection by counsel for McCreery as before.

A. I knew there was a judgment rendered against me.

Q. Did not Mr. Hubbell, your attorney, before that judgment was entered up, talk with you about having a judgment entered up without any judgment for damages, and allowing you to take off all your improvements within sixty days?

Same objection as before.

A. Well, sir, if he had, I cannot answer the question; he might possibly have done it, and might not; I cannot remember; I cannot answer the question.

Q. No writ of ejectment or of dispossession was served upon you by the sheriff, was there?

Same objection by counsel for McCreery as before.

And further, that under all the decisions of the courts and the Department, actual service of the writ of possession is un-
119 necessary, and in this case the right of Mr. McCreery to this land rested absolutely at the time he offered to make entry of the same in 1873, and a ruling thereon is asked by the R. and R.

Ruling reserved by R. & R.

Counsel for McCreery objects to the reservation of ruling.

A. I think not, sir.

RUFUS K. McCREERY.

Subscribed and sworn to before me, this 27th day of August, A. D. 1877.

ALFRED JAMES, *Register.*

McCreery here rests.

Adjourned until ten o'clock a. m., Tuesday, August 27.

Case called; all parties present.

Counsel for State here offer for use and reference in this case copy of the circular of Commissioner of General Land Office, of date January 5, 1872, marked Exhibit A, State; and copy of the letter of the Commissioner of the General Land Office, of date May 18th, 1872, marked Exhibit B, State.

Objected to by counsel for McCreery on the same ground as before; and,—

Second. Irrelevant and immaterial.

120 Third. This office was informed by letter, to which reference is hereby made, from the Commissioner of the General Land Office, dated January 5, 1872, and was not intended to be re-

troactive in its operation. That the power did not exist and could not have been exercised, either by this office or by the Commissioner, to peremptorily dismiss the pre-emption claim of Mr. McCreery, and others duly filed and being regularly prosecuted, without a hearing upon the merits.

Counsel for State here also make reference to section 2271 of the Revised Statutes of the United States.

Same objection by counsel for McCreery as before, and attention is called to the fact that the application for this land was made while the lands were within the exterior limits of the Sausal Redondo grant, and before the lands were public surveyed lands of the United States. That the application was fraudulent and void, and made in lieu of lands within the Rancho San Jacinto Viejo, a rancho still unsurveyed, and the basis thereof still unknown, to be lost to the State.

That the selection was collusive and void, and the listing by inadvertence and mistake, and void, and the State has no title to the land, and that section 2271 of the Revised Statutes of the
121 United States can in no way give validity to a fraudulent and void selection, or operate as a bar to the claim of Mr. McCreery in this case.

ALFRED JAMES, register, called on the part of the State:

Q. At the time that Mr. McCreery offered his proof and payment in February or March, 1873, or at any time prior thereto, had this office received any letter or instruction altering or modifying said circular and letter Exhibit A and B, state?

Objected to by counsel for McCreery, on the same grounds as before. And further, that the said letter from the Commissioner, dated August 27th, 1873, clearly states that no instructions were necessary in order that the rights of Mr. McCreery to this tract of land should vest absolutely by the tender of proof and offer to make payment for and entry of this land in February or March, 1873.

A. No.

Q. Did Mr. McCreery ever take any appeal from said circular or letter Exhibits A and B, state?

Same objection as before.

A. No.

Q. Has Mr. McCreery ever done anything in his pre-emption claim in this office, except to file his D. S. and offer proof and payment and the necessary fees in 1873, and make proof and payment in April, 1876?

122 Same objection as before; and further, that the record is the best evidence.

A. He has not.

Cross-examined:

Q. Were not the proof and papers filed by Mr. McCreery in sup-

port of his pre-emption claim in February or March, 1873, regularly transmitted to the Commissioner of the General Land Office?

A. They were.

Counsel for State here rest their case.

Counsel for McCreery here announce their case closed.

Counsel for McCreery ask that only ten days be allowed for the filing of arguments.

Register and receiver announces that 30 days will be allowed for the filing of the arguments, being 15 days each to counsel on both sides.

Counsel for State here ask leave to reopen the case and examine another witness who was present at the time the case was closed a few minutes ago, who was not known to the counsel for the State as a witness at that time, and that he may be examined exclusively in rebuttal of a statement made by the witness McCreery in regard to the payment of the taxes and his claiming the land since he left it in 1874.

123 Counsel for McCreery objects to the reopening of the case, and to the evidence proposed to be offered as irrelevant.

Objection overruled by R. and R.; to which counsel for McCreery except.

JOHN C. HASKELL called and sworn on the part of the State:

Q. State what conversation occurred, if any, in your presence between Mr. McCreery and Mr. Fuller; also state, as near as you can, the time — conversation occurred with reference to the payment of taxes on the land in controversy, or about some tax receipt relating to the land.

Objected to by counsel for McCreery, on the same grounds as before; and further, it is irrelevant and immaterial; and further, that so far as Mr. Fuller is concerned, it must be entirely hearsay.

A. I was at Fuller's place; I do not recollect the time exactly, but it was some time after he went there. Mr. McCreery was riding by and stopped there. He spoke to Mr. Fuller about having paid the taxes on the place; that he had no further claim on it, and wished Fuller to repay him the money. Fuller told him "all right," to bring the receipt and he would pay him. Soon after that he brought the receipt and Fuller paid him the money.

124 Q. Mr. Fuller was living there and in possession of the land at the time, was he?

Same objection as before.

A. Yes, sir.

Counsel for McCreery here moved to strike out the testimony of the witness Haskell, on the ground that it is irrelevant and immaterial and hearsay.

Cross-examined:

Q. Are you a brother-in-law of Mr. Fuller?
A. Yes, sir.

JOHN C. HASKELL.

Subscribed and sworn to before me, this 28th day of August, A. D. 1877.

ALFRED JAMES, *Register.*

Case duly closed.

To which defendants objected, on the ground that the record offered in evidence refers to various other documents and records as a part thereof, which are not attached to the record now offered in evidence in this case.

Objection overruled and defendant excepts.

The above is designated Exception No. 7.

P. R. 16.

That on the 15th day of September, 1879, the Secretary of the Interior rendered the following decision, to wit:

125 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Sept.* 15, 1879.

SIR: I have considered the case of Rufus McCreery *vs.* The State of California, involving the title of the southeast ¼ of section 14, township 2 south, range 14 west, S. B. M., Los Angeles, California, on appeal from your decision of December 21st, 1878. Your decision recites the proceedings taken in the case and several other cases involving the same question, which arose in said land district, known as the Selby cases.

The only question arising in this case is, whether the tract involved is confirmed to the State by the act of March 1st, 1877. That act confirmed generally all lands selected as indemnity by the State for school sections lost, but excepted from such confirmation tracts upon which settlements had been made "in good faith upon lands not occupied by the settlement or improvements of any other person."

The testimony in this case shows that McCreery has complied with the law; when he first settled upon the tract he found thereon a small cabin, which he purchased from the claimant thereof, and proceeded to make improvements and cultivate the land.

126 I find nothing in the case indicating a want of good faith on the part of Mr. McCreery, and his full compliance with the law having been shown, the tract should be considered as not confirmed to the State by the act of March 1st, 1877, and patent should issue to him therefor. Your decision is therefore affirmed, and the papers transmitted with your letter of March 24th, 1879, are herewith returned.

Very respectfully,

A. BELL,
Acting Secretary.

The Commissioner of the General Land Office.

To which defendant objected the same as to No. P. R. 6, herein.
Objection overruled, and defendant excepts.
The above is designated Exception No. 8.

P. R. 17.

That on the 16th day of May, 1877, the Secretary of the Interior rendered the following decision, to wit:

DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *May* 16, 1877.

SIR: I have considered the application of R. M. Widney, Esq., attorney for the State of California, for a hearing in the case of Geo. C. Selby *et al. vs.* The State of California. In accordance with
127 your instructions, dated March 20, 1876, in pursuance of my predecessor's decision of March 10th, 1876, Selby *et al.*, pre-emption claimants, made final proof and payment for the tracts claimed by each of them, respectively, on the 5th, 6th, and 15th days of April, 1876.

On the 29th day of April, 1876, my predecessor suspended his decision aforesaid, and on the 18th of August thereafter vacated the same. In the latter decision the claims of Selby, Wilkinson, McLain, Green, Foster, McC[r]eery, Ketchum, Douglas, and Hand were re-examined and approved, and it was directed that upon their showing full compliance with the pre-emption law patents should be issued to them, respectively, for the tracts claimed. It does not appear whether the proofs made by the several claimants in 1876 were before my predecessor at the time this decision was made. If they were they were disregarded and treated as improperly made, and the rights of the several parties above named were required to be established *de novo*. In acordance with this decision on the 29th day of August, 1876, you instructed the local officer to give notice to the State of the time when each of said claimants should present their proof in order that the State might show, if she could, that no valid claim existed to said lands at the time they were approved to her.

128 Notice of these instructions was given to the State, and a day appointed by the local officers to hear the proofs and allegations of the parties. No proofs were presented on the part of the claimants, and the papers filed in behalf of the State were subsequently transmitted to you. Prior to your receipt of said papers, and on the 11th day of January, 1877, you transmitted the papers then on file in your office to this Department, and asked for instructions from my predecessor, in view of his decision in relation to the issuance of second patents for the same tract of land. On the 20th of the same month you were directed to issue patents for said lands. Four days later Mr. Widney, in behalf of the State, filed a protest against the issuance of patents as aforesaid, and you were informally instructed to suspend all proceedings. On the 17th of February last you were called upon for a report as to all instructions issued by you to the local officers under my predecessor's decision aforesaid, and the action taken by them in accordance there-

with. This report was received on the 26th of the following month, from which it appears that the State has never had an opportunity to show that the claims of any of said parties were invalid, except those of Foster and Douglass, although the local officers were
129 expressly directed so to do, and the State was duly notified by the register's letter of September 9, 1876, in accordance with your instructions, that she would have such an opportunity and a day was set for said hearing.

In my predecessor's decision of the 18th of August last, although he found that the State selections were irregularly made, yet inasmuch as they had been approved to the State by his predecessor, it was held they should be permitted to stand subject to certain qualifications, among which were the following:

1st. All subsisting homestead or pre-emption rights which antedate the approval of the selections should be allowed priority over the claims of the State.

This rule was in substance incorporated as a proviso into the third section of an act of Congress approved March 1st, 1877, entitled "An act relating to indemnity school selections in the State of California," which reads as follows:

"Provided, That such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior."

130 Under the above rule and in accordance with the provisions of said act, it is necessary that the claimants should each establish that they had a valid, subsisting, pre-emption or homestead claim at the date of the certification of said tracts to the State of California, and the State is entitled to have notice of the time and place such proof will be taken, and an opportunity to offer testimony in opposition thereto if she desires so to do. Such proof must show a compliance with the homestead or pre-emption law, as the case may be, and a tender on making of final proof and payment in accordance with law and the instructions of your office.

In these cases it appears that the claimants tendered final proof and payment for their respective tracts in the months of February and March, 1873, and it is alleged that thereafter they were ousted from the possession of their respective tracts by a writ issuing out of a court of competent jurisdiction in said State, in suits instituted by said State, or claimants thereunder, and that since said ouster they have been unable to reside thereon. If these allegations shall be shown to be true, proof of compliance with law, in good faith, under which they claim until the time such tender of final proof and payment was made, and that they were qualified pre-emptors, will
131 be sufficient, and the payments made by them in April, 1876, will be considered as full payment for the land and patents should issue to them therefor. You will therefore order hearings in the following cases, viz., Selby, Wilkinson, McCain, Green, McCreery, and Ketchum, in accordance with the above in-

structions, and when the testimony is received, the cases should be decided upon their merits.

The papers transmitted with your letter "G" of March 26th, 1877, are herewith returned.

Very respectfully,

A. BELL,
Acting Secretary.

To the Commissioner of the General Land Office.

P. R. 18.

That on the 2d day of June, 1877, the Commmissioner of the General Land Office issued the following instructions, to wit:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 2d*, 1877.

REGISTER and RECEIVER, *Los Angeles, California.*

GENTLEMEN: Under date of May 16th and 28th ult., I am instructed by the Hon. Secretary of the Interior to direct you to order a hearing in each of the following cases:

Geo. C. B. Selby, Rufus McCreery *et als.*, pre-emptors, *versus* The State of California.

132 In the case of McCain a hearing was ordered by the Department March 22d, 1877, and you have been duly instructed. You will therefore take no action in his case under these instructions.

The Hon. Secretary states that it will be necessary for the claiments to establish the fact that they had a valid and subsisting "pre-emption or homestead claim at the date of the certification of said tract to the State of California, and that the State is entitled to have notice of the time and place such proof will be taken, and an opportunity to offer testimony in opposition thereto if she desires so to do." The nature of the proof required is set forth in the Secretary's decision, copies of which are herewith inclosed. Reference is made in the decision to the tender of final proof and payment by the parties in February and March, 1873, and to the allegations that thereafter they were ousted of their possession by a writ issuing out of a court of competent jurisdiction, and it is stated that "if these allegations (of dispossession) shall be shown to be true proof of compliance with the law, in good faith, under which they claim, until the time of such tender of final proof and payment was made, and that they were qualified, pre-emptors will be sufficient." You will ap-

133 point with due notice to all parties in interest a time and place that you will take testimony on the points indicated in the Secretary's decision.

At the close of the hearing forward the testimony and all papers in the case to this office with your joint opinion referring this letter, by date as "G."

Respectfully,

(Signed) J. A. WILLIAMSON, *Commissioner.*

P. R. 19.

That on the 5th day of April, 1876, the following proceedings were had and evidence filed in said United States land office, to wit:

U. S. LAND OFFICE,
LOS ANGELES, CAL., *April 5th*, 1876.

Pre-emption claim of Rufus McCreery, within Southern Pacific railroad limits.

Present: Alfred James, register; J. W. Haverstick, receiver.

On this day came the above-named Rufus McCreery, claiming as a pre-emption right the southeast ¼ of section 14, township 2 south, range 14 west, San Bernardino meridian, who filed his declaratory statement, No. 357, on the 28th day of November, 1871, alleging settlement on the 21st day of December, 1869, and offered
134 to make proof of his right and payment for the same.

Amended township plat filed in this office on the 12th day of June, 1872. Original plat filed Nov. 21, 1871. Adverse claims. See Commissioner's letter "9," March 20th, 1876.

Non-mineral affidavit in due form and duly verified April 5th, 1877.

Duly filed.

Pre-emption Affidavit, Cal.

I, Rufus McCreery, of Los Angeles county, State of California, claiming the right of pre-emption under the provisions of the act of Congress, entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 2nd, 1853, and under the act of Congress approved May 30, 1862, entitled "An act to reduce the expenses of the survey and sale of public lands in the United States to the following-described lands, subject to sale or entry at the United States land office at Los Angeles, State of California, southeast ¼ section 14, township 2 south, 14 west, base and meridian of San
135 Bernardino, do solemnly swear that I am a citizen of the United States, over the age of 21 years; that I am not the owner of three hundred and twenty acres of land in any of the States or Territories of the United States; that I made settlement upon said land, and that I have improved said land, not to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; that I have not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which I may acquire from the Government of the United States should inure in whole or in part to the benefit of any person or persons, except myself, and that I have not heretofore had the benefit of the pre-emption laws in any of the States or Territories of the United States. I further state that I have resided on said land with my family continuously since December 21st, 1869, except about one year and a half (1½), during which time I was put off and kept off by a writ of possession, issued

against me by reason of a fraudulent and pretended State selection of the land as lieu land, and that I now reside thereon with my family.

RUFUS McCREERY.

136 I hereby certify that the above affidavit was taken and subscribed before me, this 5th day of April, A. D. 1876.

ALFRED JAMES, *Register.*

Duly filed July 5, 1876.

ROBERT K. MCGEE, Los Angeles county, State of California, being called as a witness in support of the pre-emption claim of Rufus McCreery, who filed his declaratory statement, No. 357, Nov. 28, 1871, alleging settlement Dec. 21, 1869, and first being duly sworn, testified as follows by questions and answers:

Q. What is your age, your place of residence, and your occupation?

A. I am more than 21 years of age; I reside in Los Angeles county, State of California, and am by occupation a farmer.

Q. How long have you known Mr. McCreery, the claimant in this case?

A. I have known him more than eight years.

Q. Is he a citizen of the United States; if so, native or naturalized?

A. He is a native citizen of the United States.

Q. Is he the head of a family or a single man over 21 years of age?

A. He is the head of a family, and has a wife and three children.

Q. Do you know the land claimed by him under the pre-emption laws of the United States? If so, describe the same.

137 A. I know the tract so claimed; I have known it more than eight years last past; it is the southeast quarter section fourteen, township two (2) south, range fourteen west, of San Bernardino meridian.

Q. What is the character of the land, mineral or agricultural?

A. It is agricultural land.

Q. When did he enter upon the same, and for what purpose?

A. About December 21st, 1869, for farming purposes.

Q. Did he within your knowledge leave land of his own to settle on this?

A. He did not, within my knowledge.

Q. Is he the owner of three hundred and twenty acres of land in any of the States or Territories of the United States, to your knowledge?

A. He is not within my knowledge.

Q. Has he made any contract, either directly or indirectly, by which the title he may acquire from the United States should inure to the benefit of any person except himself?

A. He has made no such contract, either directly or indirectly, within my knowledge.

Q. Has he resided on this land; if so, what has been the character of such residence, and what improvements has he put on it?

A. He has resided upon the land claimed by him as a pre-emptor for more than six years last past, except about one year and a half that he was kept off from the same by reason of a pretended and fraudulent State selection and writ of possession obtained
138 thereby. He now resides on the land, and has made improvements thereon, consisting of a house, well, corral, stable, spring-house, out-buildings, fence, and some fruit trees.

Q. What is the actual value of these improvements in gold coin?

A. About one thousand dollars.

Q. Has there been any cultivation of the tract described by the claimant; and, if so, in what manner?

A. There has been about 50 acres of land plowed and sown to grain by the claimant several times.

Q. Has there been any adverse occupation or cultivation of the land by other parties during the last six months?

A. There has not, except by those who have claimed possession under a pretended and fraudulent State selection.

Q. Have you any interest in the land?

A. I have none of any character.

R. K. McGEE.

The foregoing testimony having been first read over by the witness and corrected to his satisfaction, was by him subscribed and sworn to before me, this 5th day of April, A. D. 1876.

ALFRED JAMES, *Register.*

FRANCIS O. WILKINSON, of Los Angeles county, State of California, being called on as a witness in support of the pre-emption claim of Rufus McCreery, who filed his declaratory statement, No.
139 357, November 28, 1871, alleging settlement December 28, 1869, and first being duly sworn, testified as follows by question and answer:

Q. What is your age, place of residence, and occupation?

A. I am more than 21 years of age; I reside in Los Angeles, State of California, and am by occupation a farmer.

Q. How long have you known Mr. Rufus McCreery, the claimant in this case?

A. I have known eight years or more.

Q. Is he a citizen of the United States; if so, native or naturalized?

A. He is a native born citizen of the United States.

Q. Is the head of a family or a single man over 21 years of age?

A. He is the head of a family—a wife and three children.

Q. Do you know the land claimed by him under the pre-emption laws of the United States. If so, describe the same.

A. I know the tract as claimed; I have known it for eight years. It is the southeast quarter section fourteen, township two south, range 14 west, of San Bernardino meridian.

Q. What is the character of the land, mineral or agricultural?

A. It is agricultural.

Q. When did he enter upon the same, and for what purpose?

A. About December 21, 1869, for farming purposes.

Q. Did he, within your knowledge, leave land of his own to settle upon this?

A. He did not, to my knowledge.

140 Q. Is he the owner of three hundred and twenty acres of land in any of the States or Territories of the United States, to your knowledge?

A. He is not, within my knowledge.

Q. Has he made any contract, either directly or indirectly, by which the title he may acquire from the United States should inure to the benefit of any person or persons except himself?

A. He has made no such contract, either directly or indirectly, within my knowledge.

Q. Has he resided on this land; if so, what has been the character of such residence, and what improvements has he put on it?

A. He has resided on the land claimed by him as a pre-emptor for more than six years last past, except about one year and a half that he was kept off from the same by reason of a pretended and fraudulent State selection, and writ of possession obtained thereby. He now resides on the land, and has made improvements thereon, consisting of a house, well, corral, stable, spring-house, out-buildings, fence, and some fruit trees.

Q. What is the actual value of these improvements in gold coin?

A. About one thousand dollars.

Q. Has there been any cultivation of the tract described by the claimant; and, if so, in what manner?

A. There has been about fifty acres of this land plowed and sowed to grain by the claimant several times.

Q. Has there been any adverse occupation or cultivation

141 of the land by other parties during the last six months?

A. There has not, except by those who claimed possession under pretended and fraudulent State selection.

Q. Have you any interest in the land?

A. I have none of any character.

FRANCIS O. WILKINSON.

The foregoing testimony having been first read over by the witness and corrected to his satisfaction, was by him subscribed and sworn to before me, this 5th day of April, A. D. 1876.

ALFRED JAMES, *Register.*

J. C. Haskell, defendant, testified that to his knowledge no suit had ever been brought in any court to cancel the patent to the State, shown in Stipulation No. III, def't.

All documentary evidence and exhibits for plaintiff and defendant were duly certified to. The foregoing constitutes all the evidence, stipulations, and proceedings in the case bearing on the assignment and specifications of error in the case.

Thereupon the case was submitted to the court, and subsequently the court made its findings of fact and conclusions of law and judgment, and filed the same, as hereinbefore shown.

142 *Specifications and Assignment of Errors.*

Defendant. Specify and assign the following particulars wherein the evidence is insufficient to justify the decision and findings and judgment of the court, and the same are contrary to the evidence.

I.

The evidence is insufficient to justify the first finding of fact, and the same is contrary to the evidence in this: That the evidence shows that the plaintiff was not, on October 10, 1879, or at any other time has been seized in fee or otherwise, or entitled to the possession of said premises or any part thereof in this: The evidence shows that the land in controversy had been selected by the State of California as an indemnity school selection in 1868 (Stipulation No. III), under the 6th and 7th sections of the act of Congress of March 3, 1853, entitled "An act to provide for the survey of the public lands in California," and for other purposes, and that said selection had been approved by the Secretary of the Interior Nov. 24, 1871, as required by section 7 of said act, and that in pursuance of the foregoing the usual patent and conveyance from the United States (stipulation No. III, def't) of said land, dated November 24, 1871,
143 was delivered to the State of California and accepted by the State, and thereafter there was no title in the United States to convey to plaintiff under his subsequent pre-emption proceedings and patent. Said conveyance and patent to the State was not shown to have ever been voided or annulled by the judgment of any court, and after said patent and conveyance to the State, Nov. 24, 1871 (Stipulation No. III, defendant), the United States Land Department had no further jurisdiction or control over the title or proceedings in relation to the land.

The evidence (Stipulations No. I, II, XIII, XIV, IX, X, XI, XII, defendant) shows that plaintiff has no title in this, that the land was within the claimed limits of the Rancho Sausal Redondo, a confirmed Mexican grant at the date of plaintiff's alleged settlement in 1869, and at the date of filing his declaratory statement, Nov. 28, 1871 (at which last date the land had been patented to the State of California, Stipulation III, defendant), and at date of his tender of proof and of payment in 1873, and said land was not excluded from the claimed limits of said grant by the approval of the final survey thereof by the Commissioners of the General Land Office, and by issuance of patent for said rancho, until March 22d, 1875. That the settlement and possession of plaintiff, on
144 which he bases his patent and title, were limited to a period from December, 1869, to September, 1874, during which time the land was not subject to pre-emption settlement, or to the pre-emption laws, and plaintiff never acquired any pre-emption right by his settlement and occupation or possession of said land prior to its exclusion from the claimed limits of the said grant. And since said land was excluded, March 22d, 1875, from the claim of said grant, plaintiff has never had any settlement or occupation on said land.

That her settlement and occupation from 1869 to 1874 was a a trespass, and without color of right, and that plaintiff initiated thereby no pre-emption right and acquired no title thereby under the pre-emption laws of the United States. The evidence further further shows that said land was selected by the proper authorities of the State of California, as an indemnity school selection, April 22d, 1868, and thereby the land was appropriated and disposed of, and under section 2271 Revised Statutes of the United States plaintiff was prohibited from acquiring or perfecting any title to said land as a pre-emption or otherwise.

The evidence shows that plaintiff never has complied with the pre-emption laws, but that his acts and proceedings were in violation of said laws and void.

145 II.

The II finding of fact is not supported or justfied by the evidence, and the said finding of fact is contrary to the evidence in this: That (Stipulation No. II, XIII, defendant) show that plaintiff has not had any occupation or possession of the premises in controversy since September, 1874, and that the defendant has been in the full, actual, and peaceable possession under title of said land since October, 1874, and that they did not oust plaintiff at any time.

III.

The evidence does not justify or sustain the V finding of facts, and the same is contrary to the evidence in this, that the evidence show that the land in controversy was certified to the State of California (Stipulation No. III, defendant) Nov. 24, 1871, and is known as an indemnity school selection, which land was selected in 1868, in lieu of the S. E. ¼ of section 16, lying within a Mexican grant (Stipulation P. R. 3), of which the final survey had not been made at the date of such selection, and by act of Congress of Mar. 1st, 1877, entitled "An act relating to indemnity school selections in the State of California," the said selection and title was confirmed, and the United States was divested of all title and color of title in
146 1877, and plaintiff took no title by his subsequent patent in 1869. The evidence (Stipulations No. II and XIII, defendant) shows that said land was not excepted from the confirmation of said act under section three thereof in this, that plaintiff was not an actual settler on said land in 1877, neither did he comply with said section 3, nor with the rules and regulations prescribed thereunder by the Commissioner of the General Land Office.

The answer and amendment thereto, and the evidence shows that defendant's claim under said confirmation by said act of Congress and that defendant's title was confirmed by said act.

IV.

The evidence does not justify or sustain the VIII finding of fact, and the same is contrary to the evidence in this, that (Stipulation No. III, defendant) shows that the Secretary of the Interior and

the Commissioner of the General Land Office did not inadvertently or by mistake certify or list the land in question to the State of California, but shows that the same was intentionally and carefully and consciously done by those officers in the regular discharge of their duty as prescribed by law.

V.

147 The finding does not justify or sustain the IX finding of fact, and the same is contrary to the evidence in this, the evidence (Stipulation No. IX, X, XI, XII, def't, & P. R. 4) show that the land in controversy was not released from the claimed limits of the Mexican grant Sausal Redondo until March 22d, 1875.

VI.

The evidence not justify or sustain the XI finding of fact in this: The evidence shows that plaintiff was not a settler in good faith on said land, or that he performed all acts required by said pre-emption law; the evidence shows that he was a trespasser on said land during his occupation, from December, 1869, to September, 1874, and that all of his acts during said period were without authority of law and in violation of law, and void, by reason of the land being withdrawn from the pre-emption laws, by being within the claimed limits of the Rancho Sausal Redondo grant, and all other acts performed by plaintiff after March 22, 1875, the date when said land was excluded from the claimed limits of said grant, as shown by Stipulation No. X, XI, def't, were void by reason of the fact that said plaintiff had no settlement on said land, and filed no declaratory statement therefor at any time after the exclusion of the land from said grant claim.

148 VII.

The evidence does not justify or support the XIII finding of fact, in this: That the evidence shows that the said certificate of cash entry was issued in violation of law and upon false and fraudulent proof as to plaintiff's residence and occupation of said land at that date, as shown by Stipulation No. XIII and P. R. 22, and that it was wholly unauthorized by law.

VIII.

The evidence does not justify or sustain the XIV finding of fact, and the same is contrary to law in this: That the evidence shows that the defendants herein never were served with any notice of hearing or of any proceedings in the Land Department of the United States on the part of the claim of the plaintiff herein and that as to these defendants. All of such proceedings by plaintiff were from first to last *ex parte* and without jurisdiction of these defendants or any real party in interest, as shown by Stipulation No. XVII; and the evidence shows that all parties in interest, to wit,

these defendants, never have been represented in any of the proceedings by plaintiff before the United States Land Department.

The evidence shows that the State of California never ap-
149 peared, except on its own behalf (Stipulation P. R. 11 & P. R. 12), in which the State disclaimed all interest in the premises as having sold and patented the land to Mr. Keller in 1871 and 1874.

IX.

The evidence does not justify or sustain the XV finding of fact, in this: That the evidence shows that said officers had no authority or jurisdiction to hear, or consider, or determine any of the matters referred to in said finding 15, the same being had without any notice to defendant of the time and place of said hearing, and without any jurisdiction of them, and in violation of the instructions of the Commissioner of the General Land Office, as shown in his letter of June 2d, 1877, Stipulation P. R. 18, and Stipulation XVII, defendant, and under the act of Congress of March 1, 1877, An act relating to indemnity school selections in State of California, sec. 3.

X.

The evidence does not justify or sustain the XVI finding of fact, in this: The evidence (Stipulation XIII, Def't, and P. R. 19) shows that plaintiff committed the fraud at the time and place, and as alleged in defendant's answer.

XI.

150 The evidence does not justify or sustain the XVII finding of fact, in this: The evidence (Stipulation No. VIII, Def't) shows that said plaintiff set up as a defence his pre-emption claim, and in said suit, by his own stipulation therein, consented to the entry of judgment against him and his claim, and he voluntarily agreed therein to remove from said land, and he voluntarily did remove from said land pursuant to said agreement, and removed all of his improvements therefrom in September, 1874.

Errors of Law Occurring at the Trial and Objected and Excepted to by Defendant.

1st. The court erred in not ruling upon and in not entering of record any ruling upon defendant. Exceptions designated No. 1, No. 3.

2d. The court erred in overruling defendant's objections, as shown in Exceptions Nos. 2, 3½, 4, 5, 6, 7, and 8, as hereinbefore designated.

3d. The court erred in its conclusions of law in ordering judgment for plaintiff.

JUNE 7TH, 1881.

The foregoing constitutes a full, true, and correct statement in the case of all matters bearing upon the assignment of error.

151 JUNE 7, 1881.

I hereby certify that the foregoing statement on motion for new trial is allowed.

V. E. HOWARD,
Judge of the Superior Court of Los Angeles Co., Cal.

Endorsed: Duly filed June 7, 1881.

(Title of Court and Cause.)

Motion for new trial denied, July 30, 1881.

V. E. HOWARD, *Judge.*

Notice of Appeal.

(Title of Court and Cause.)

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of the State from the judgment entered and made against defendants and in favor of plaintiff on April 6, 1881, and from the order of court therein made and entered in the said superior court on the 30th day of July, 1881, in favor of plaintiff and against said defendant, denying the defendant's motion for a new trial and from the whole thereof.

Dated this 15th day of August, 1881.

Yours, &c.,

R. M. WIDNEY,
Attorney for Def't.

152 To the Clerk of said Superior Court, and WILL D. GOULD and J. H. BLANCHARD, *Attorneys for Plaintiff.*

Endorsed: Title of court and cause. Notice of appeal filed August 15th, 1881. A. W. Potts, clerk.

Due service and a receipt of a copy hereof admitted after filing, this 15th day of August, 1881.

WILL D. GOULD AND
J. H. BLANCHARD,
Att'ys for Plaintiff.

(Title of Court and Cause.)

MCCREERY *vs.* FULLER *et al.*

It is hereby stipulated that the foregoing transcript is correct and contains a complete copy of all the papers therein set out and used on the motion for a new trial.

Sept. 10, 1881.

WILL D. GOULD,
JAS. H. BLANCHARD,
Atty's for Pl'ff.
R. M. WIDNEY,
Att'ys for Def'ts.

Superior Court, Los Angeles Co., Cal.

R. McCREERY *vs.* Mrs. E. A. FULLER *et al.*

I, A. W. Potts, clerk of said court, hereby certify that an undertaking on appeal in due form has been properly filed by appellant in the above-entitled case.

Sept. 10, 1881.

[SEAL.]

A. W. POTTS,
Clerk of said Court.

153 Service acknowledged this 15 day of Sept., 1881.

WILL D. GOULD,
JAS. H. BLANCHARD,
Attorneys for P'l'ff.

Endorsed: Filed September 15, 1881. F. W. Gross, clerk, by Jno. O. Wheeler, deputy.

154 *Submission—Order of.*

"In the Supreme Court of the State of California."

McCREERY *vs.* FULLER. } 8026.

1881, Oct'r 17.—Argued by Widney for appellant and Gould for respondent, and appellant granted 10 days to reply to respondent's points and authorities, and to be then submitted.

Submission of Cause.

Title of Court and Cause.

1881, Oct'r 22.—Filed reply to respondent's points and submitted.

155 *Assignment of Cause to Bank.*

"In the Supreme Court of the State of California."

McCREERY *vs.* FULLER.

1882, January 28.—Ordered that submission of this cause be set aside.

By the court.

Title of Court and Cause.

1882, January 28.—Ordered to be heard in bank.

By chief justice.

156 *Order of Assignment.*

"In the Supreme Court of the State of California."

McCREERY *v.* FULLER. } 8026.

1882, July 28.—Ordered that the submission of this case be, and

the same is, set aside, and that the case be placed on the calendar for reargument upon the question whether or not the judgment in Keller *v.* McCreery is a bar to this action.

The court.

Order of Submission.

Title of Court and Cause.

1882, Oct'r 17.—Argued by Widney for appellant and Gould for respondent, and submitted.

By the court.

157 *Judgment.*

In the Supreme Court of the State of California. In Bank.

R. McCREERY, Respondent,
vs.
Mrs. E. A. FULLER *et al.*, Appellants. } No. 8026.

On Appeal from the Superior Court in and for the County of Los Angeles.

JANUARY 13TH, 1883.

And now at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by McKee, J.

I concur in the judgment.

McKINSTRY, *J.*

Concurring opinion by Thornton, J.

I concur in the judgment and opinion of Mr. Justice Thornton.

MORRISON, *C. J.*

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles in the above-entitled cause be, and the same are hereby, reversed, with costs, and the cause remanded, with direction to the court below to enter judgment for defendants.

158 *Opinion.*

In Bank. Filed January 13, 1883.

McCREERY
vs.
FULLER. } No. 8026.

This case arises out of an action of ejectment. From the record of the case it appears that the demanded premises were selected by the State of California on the 22d of April, 1868; that on the 29th of December, 1869, the plaintiff McCreery entered upon them and filed his declaratory statement in the proper United States land

office on the 28th of November, 1871. But on the 24th of November, 1871, the Secretary of the Interior of the United States had approved the selection which had been made by the State; and the United States, by patent of that date, conveyed the land to the State. After obtaining the patent the State sold the land to one M. Keller, and issued to him a certificate of purchase for the same, which was afterwards confirmed by an act of the Legislature, entitled "An act for the relief of purchasers of State lands," approved March 27, 1872, and on the 4th of March, 1874, Keller obtained from the State a patent for the land.

Claiming to be owner in fee, Keller on the 24th of April, 1874, commenced an action of ejectment against McCreery to recover possession. By his answer to the complaint in that action the defendant denied the ownership of Keller, and affirmatively alleged that the patent issued to the plaintiff by the State of California, and under and by virtue of which his pretended title to the land in controversy is set up and maintained was obtained by fraud and misrepresentation; and that the defendant had, on the 21st day of December, 1869, entered on the land as a qualified pre-emptor, and on or about the 28th of November, 1871, filed in the land office of the district in which the land was situated his declaration of intention to pre-empt said land, and that he was entitled to the possession of the same.

Upon these issues the parties to the action stipulated on the 30th of June, 1874, "that judgment may be entered of this date for the plaintiff for the possession of the premises described in the complaint herein, but without any rents and profits or damage for the withholding the same. Execution is to be stayed on this judgment for sixty (60) days, within which time the defendant may without molestation remove any buildings or other improvements from said premises for his own use, without further compensation therefor." Judgment was accordingly entered in favor of Keller against McCreery, for recovery of the possession of said land and premises, together with his costs and disbursements. Under that judgment Keller was put in possession of the land; and, being in possession, he sold and conveyed the same on the 11th of October, 1874, to Frederick Fuller, the then husband of the present defendant, who who entered into possession under his deed, and continued to reside on the land until his death in July, 1876, since which time his widow, defendant in this case, has continuously, down to the commencement of this action, on October 28, 1879, occupied the land, cultivating the same within a substantial inclosure.

It will be observed that the issues in that action involved the validity of the original selection of the land by the State, and of the subsequent proceedings with reference to it, which culminated in the certification of the land over to the State, and the issuance of the patent to the State, but also the validity of the original entry on the land by the defendant, as a qualified pre-emptor, and the subsequent proceedings taken by him to pre-empt the same. These things being in issue were all necessarily determined by the judgment in favor of the plaintiff. No question can arise as to whether that judgment

was correct or erroneous. Standing as it does as the judgment of a court of competent jurisdiction, unappealed from and unreversed, it is decisive of the rights of the parties to the subject-matter or the action whether it was right or wrong. Where issues are made in a case and decided, whether with or without trial, the judgment is conclusive between the same parties, in any subsequent action for the same cause, as to all questions which were directly involved within the issues made, and which were, or might have been, presented and decided (Le Guen *vs.* Governor, 1 Johns. Cas., 436; Stockton *vs.* Ford, 18 How., 418; Mallony *vs.* Horan, 49 N. Y., 14; McClurg *vs.* Condit, 27 Minn., 45); and such questions cannot be again contested between the same parties in the same or any other court. (Hopkins *vs.* Lea, 6 Wheat., 109; Russell *vs.* Place, 94 U. S., 606.) As a *res adjudicata* the judgment is binding on all tribunals and conclusive between the parties and those deriving title under them, as to the validity of the certification of the land over to the State, and of the patent thereto issued by the United States to the State, and of the patent granted by the State to Keller upon which the judgment was founded. By the certification and patent the title to the land passed from the United States to the State of California. (Grinnell *vs.* R. R. Co., 103 U. S., 742.) Thereafter the authorities of the United States were without jurisdiction over it. The title which had vested in the State, and passed from the State to Keller, the plaintiff in judgment, could not be divested, except by judicial proceedings to cancel or rescind the patent for fraud, mistake, or misconstruction of the law under which it was issued. (O'Connor *vs.* Frasher, 56 Cal., 499, and cases cited.) No executive officer of the United States had authority to recall or rescind the patent, or to issue one to another party for the same tract. (Moore *vs.* Robbins, 96 U. S., 530.) The proceedings taken by McCreery in the Land Department of the United States, which culminated in a patent to him for the same land, subsequent to the acquisition of the title by the State, and to the judgment against him founded upon that title, were therefore void, and conferred upon him no title.

It follows that the judgment and order must be reversed and the cause remanded, with direction to the court below to enter judgment for defendants.

McKEE, *J.*

I concur in the judgment.

McKINSTRY, *J.*

Concurring Opinion.

I concur in the judgment, on the ground that the judgment in Keller *vs.* McCreery is conclusive against the plaintiff and determinative of the cause in favor of Fuller, who derives title under Keller by conveyance subsequent to the rendition of the judgment above mentioned.

THORNTON, *J.*

I concur in the judgment and opinion of Mr. Justice Thornton.

MORRISON, *C. J.*

159 *Order Denying Rehearing.*

In the Supreme Court of the State of California.

McCreery v. Fuller. } 8026.

Febr'y 2, 1883. Filed petition for rehearing in bank.

L. A.

Title of Court and Cause.

Febr'y 12, 1883. Petition for rehearing denied by the court.

160 *Bond on Writ of Error.*

In the Supreme Court of the United States.

Rufus McCreery, Plaintiff in Error,

vs.

Mrs. E. A. Fuller and J. C. Haskell, Defendants in Error.

Know all men by these presents, that we, John Schumacher and Frank Toal, residents and freeholders of Los Angeles city and county, State of California, are held and firmly bound unto Mrs. E. A. Fuller and J. C. Haskell, defendants in error herein, in the sum of five hundred dollars ($500) lawful money of the United States of America, to be paid to the said Mrs. E. A. Fuller and J C. Haskell, their heirs, executors, or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this 19th day of February, A. D. 1883.

161 Whereas said Rufus McCreery, plaintiff in error herein, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California in the cause entitled Rufus McCreery against Mrs. E. A. Fuller and J. C. Haskell (No. 8026):

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all damages and costs, ———; if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

JOHN SCHUMACHER.
FRANK TOAL.

Signed, sealed, and delivered in presence of—
WILL D. GOULD.
JOHN T. GAFFEY.

United States of America, *State and District of California,* } ss:

John Schumacher and Frank Toal, being duly sworn, each
162 for himself, deposes and says: That he is a resident and householder in said district of California, and is worth the sum of

165 *Clerk's Certificate.*

In the Supreme Court of the State of California.

RUFUS MCCREERY, Plaintiff in Error,

v.

MRS. E. A. FULLER and J. C. HASKELL, Defendants in Error.

I, John W. McCarthy, clerk of the supreme court of the State of California, do hereby certify that the foregoing 164 pages, numbered from 1 to 164, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court, this 30th day of June, 1883.

[SEAL.]

JNO. W. MCCARTHY, *Clerk*,
By JNO. KILSBY, *Deputy Clerk*.

Endorsed on cover: California supreme court. No. 578. Rufus McCreery, plaintiff in error, *vs.* Mrs. E. A. Fuller and J. C. Haskell. Filed 17th September, 1883.

119-329

Office Supreme Court U. S.
FILED
DEC 5 1884
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1884.

RUFUS McCREERY,
Plaintiff in Error,
vs.
MRS. E. A. FULLER AND J. C. HASKELL,
Defendants in Error.

No. 578.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

GEO. F. EDMUNDS,
WILLIAM J. JOHNSTON,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.
C. W. BROWN, PRINTER, 923 F STREET,
1884.

In the Supreme Court of the United States

October Term, A. D. 1884.

RUFUS McCREERY, PLAINTIFF IN ERROR,

vs.

MRS. E. A. FULLER AND J. C. HASKELL, DEFENDANTS IN ERROR.

No. 578.

In Error to the Supreme Court of California.

Answer of Plaintiff in Error to Motion to Dismiss for Want of Jurisdiction.

This motion to dismiss ought not to be granted.

I.

It appears affirmatively by the record and judgment that a federal question was raised and presented to the Supreme Court of the State of California for its decision, and also that the question was decided. (See opinion of McKee, J., and concurrence of McKinstry, J., in the judgment. Record, pages 68, 69, 70.)

In this judgment both branches of the defense of defendant in error "*res adjudicata*" and "equitable" were discussed and decided, the equitable defense embracing the federal question.

Two of the justices of the Supreme Court of California, Thornton, J., and Morrison, C. J., concurred in the judgment on the grounds of "*res adjudicata*" alone.

Thus, while four justices concurred in the judgment, only

two deemed the matter of *res adjudicata* determinative of the issue in the case.

II.

Federal questions were raised, as will appear by the record, and presented to the Supreme Court of the State of California for its decision, and the decision of those questions was necessary to the judgment rendered.

The record shows that subsequent to the determination of the questions claimed as "*res adjudicata*" in this case, the plaintiff in error acquired a new title (a patent) under the pre-emption proceedings.

This new title was never in issue, and could never have been put in issue, because it did not exist either in law or equity.

The Supreme Court of the State of California has decided over and over again that a pre-emptor has no rights that can be successfully urged against a paper title; the doctrine of the Supreme Court being that the bare right of pre-emption does not place the possessor in privity with the paramount source of title to raise the questions decided by the court as "*res adjudicata*."

The filing of a declaratory statement does not confer a vested right, and that is all McCreery had.

To decide at one time that the plaintiff in error had no such privity with the source of title as to be able to defend and therefore eject him from the land, and afterwards, having new paper title, to say that the former judgment in ejectment is *res adjudicata*, does not satisfy justice, and will not be permitted to hide important questions and bury sacred rights. The Supreme Court of California has decided that the doctrine of *res adjudicata* cannot be invoked in the following paralell cases:

Valentine *vs.* Mahoney, 37 Cal., 396.
Mahoney *vs.* Van Winkle, 33 Cal., 458.
Larrabee *vs.* Selby, 52 Cal., 507.

The judgment in favor of Keller against McCreery in the action of ejectment was rendered in September, 1874. (Record, page 10, finding XVI½.)

Afterwards and on the 10th of October, 1879, McCreery obtained patent for the land from the United States. (Record, page 10, finding XIII.)

The decision of the Supreme Court of California, therefore, that the judgment of 1874 was a bar to a trial of the merits, was a judgment that subsequent title acquired by patent from the United States to the land in question, must be overturned because of a prior adjudication.

It is submitted that in such a case the question of *res adjudicata* is not a question of general law, but is indissolubly associated with a decision on the strength of the patent itself, as clearly so as if, in the old action, neither party had claimed any title from any source, and one had forcibly expelled the other from possession and afterwards one of them had obtained a valid patent for the land. In such a case the *res adjudicata* principle certainly could not apply so as to prevent this court from protecting the patent title.

The *decision* of the court below in this case was that the patent title of McCreery could not be upheld on account of an adjudication prior to the existence of the patent, and it was therefore merely giving a reason for overthrowing the patent, which patent had never been, and could not possibly have been, drawn in question in any court.

It is believed that the doctrine of *res adjudicata* has never been extended to a case like this.

To uphold such a doctrine would deny to this court the power to protect titles derived from the United States, the parties to which had never submitted them to the adjudication of any State court, and its monstrous injustice is apparent.

We ask that the motion may be denied.

GEORGE F. EDMUNDS,
WILLIAM J. JOHNSTON,
Atty's for Plaintiff in Error.

119-327

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

October Term 1886.—No. 46.

RUFUS McCREERY, PLAINTIFF IN ERROR,

vs.

MRS. E. A. FULLER AND J. C. HASKELL.

Error to the Supreme Court of the State of California.

Points for the Plaintiff in Error.

I.

This case is entirely different from the case of Frasher *v.* O'Connor (115 U. S., p. 102). In that case it was held that a claimant under the pre-emption laws whose right had not been recognized by the United States could not hold against a claimant under the State to which the land had been listed by the officers of the United States, and whose action had not in any way been called in question other than by this private claimant. And it was also held that the pre-emption claimant could not draw into question any irregularities which the authorities of the United States and those of California did not choose to call in question.

But in the Frasher case it was distinctly held that the officers of the United States might call in question the matter whether the State possessed the right to claim the land under the grant to it, and whether the land was subject to selection by its agents.

In the case at bar the State trial court found as facts

that the first claimant under the State claims through an application by Ransom, the locating agent, on 22d April, 1868, as lieu land for a supposed failure of the school grant of the sixteenth and thirty-sixth sections; that at that date the land in respect of the loss of which the land in question was claimed was, and continued to be until the commencement of this action, "within the exterior surveyed limits of the Rancho San Jacinto Viejo, a valid Mexican grant, the final survey of which grant had not yet been made at the commencement of this action." (Rec., p. 8, paragraphs 6 and 7.) It was also found that, in consequence of the selection of the land in question under such circumstances, the Secretary of the Interior inadvertently and by mistake surveyed and listed the land in question to the State of California in lieu of said quarter section before mentioned, which it had not then appeared was lost to the State.

It appeared, also, that the land in question was not when such selection was made, nor when the pre-emption claimant settled on it, fully freed by a final and approved survey from the exterior limits of the Rancho Sausal Redondo. (Rec., p. 9, paragraph IX.)

It further appeared that the plaintiff settled on the land in question as a lawful pre-emptor on 21st December, 1869, and filed his declaratory statement 28th November, 1871, four days after the land in question had been finally separated from the Rancho grant.

It further appeared that the plaintiff was a proper pre-emption settler; that he settled on the land in good faith as such, and performed every act that the law required for a pre-emptioner to do; that, under due proceedings, the plaintiff obtained a patent for the land on the 10th October, 1879. (Rec., p. 10, paragraph XIII.)

It further appeared that the whole matter of the illegality of the listing of the land to the State of California and the regularity and propriety of the plaintiff's pre-emption claim was duly contested before the Secretary of the Interior, in which contest the State of California and all

parties in interest were represented, and upon which hearing the Secretary of the Interior held that the listing of the land to the State of California was illegal and irregular, and the listing was vacated, and a patent issued to the pre-emption claimant.

In this state of things, it is submitted that the plaintiff's pre-emption settlement and claim was perfectly legal and regular when it was commenced, and he in possession at the final survey, and that at that time the State of California had no title to the land whatever.

It is clear that the right of the State to select lieu lands could only exist in respect of lands which, at the time of such selection, had been lost under the school grants, which was not this case; and, secondly, it is clear that the right of the State to select lands must be confined to those that were open to settlement, as the selected land was not at that time, as it had not been separated from the Sausal Redondo grant. At the moment when the separation occurred the plaintiff was in possession as a lawful pre-emptor, and pursued his rights to a final patent grant, obtained upon due consideration. To overthrow this pre-emption, therefore, it must be held that the illegal and erroneous certificate to a State cannot be rectified or recalled by the administrative offices of the United States, and that the State gets a good title out of the illegal and unauthorized act of its own agents and the officers of the United States.

II.

The Supreme Court of California was mistaken in supposing (Rec., p. 70) that the United States had ever issued any patent to the State of California. The Record shows (pp. 13 and 14) that all that took place was the ordinary certification and listing, which, as has been already shown, was entirely without authority of law, and which was recalled on full hearing as soon as the matter was brought to the attention of the Department.

III.

The court below appeared to put its principal ground of decision upon the force of a judgment in ejectment against the plaintiff in favor of the party claiming under the State.

At the time of the rendition of this judgment the certificate and listing to the State stood uncancelled, and the plaintiff had not obtained his patent or completed his pre-emption proofs.

The judgment was by consent. (Record, p. 17.)

Nothing, therefore, was drawn in question or decided, except the simple fact that the present plaintiff was, through his own consent, to be turned out of possession by the claimant in the State suit. No such judgment is an estoppel on any question in the pending controversy. The very case of Russell *v.* Place, 94 U. S., p. 606, relied upon in the opinion of the Supreme Court of California, demonstrates the correctness of this proposition.

Besides this, in the judgment by consent there was, of course, no trial and no proofs, and, for aught that appears in the Record, the plaintiff therein might have recovered on the simple ground that he was the lessee of the present plaintiff, and that his term had not expired, or on any number of other grounds that would have no relation to the question now involved. But it is enough to say that the court in which the consent ejectment judgment was entered was not called upon, either by pleadings or proofs or consent of parties, to determine on the validity of the title depending upon a state of circumstances that did not then exist, and which, of course, could not then have been put in proof had the case gone to a contest.

It is submitted, therefore, with some confidence that this one of many wronged settlers has strictly legal, as well as equitable, grounds on which he may demand the protection of his homestead in this court.

GEO. F. EDMUNDS,
Of Counsel for the Plaintiff in Error.

III.

The court below appeared to put its principal ground of decision upon the force of a judgment in ejectment against the plaintiff in favor of the party claiming under the State.

At the time of the rendition of this judgment the certificate and listing to the State stood uncancelled, and the plaintiff had not obtained his patent or completed his preemption proofs.

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It is submitted, therefore, with some confidence that this one of many wronged settlers has strictly legal, as well as equitable, grounds on which he may demand the protection of his homestead in this court.

GEO. F. EDMUNDS,
Of Counsel for the Plaintiff in Error.

119-327

Office Supreme Court U. S.
FILED
DEC 8 1884
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1884.

RUFUS McCREERY,
Plaintiff in Error,
vs.
MRS. E. A. FULLER AND J. C. HASKELL,
Defendants in Error.

No. 578.

Brief of Defendants in Error on Motion to Dismiss for Want of Jurisdiction.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Attorneys for Defts. in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1884.

In the Supreme Court of the United States.

October Term, A. D. 1884.

RUFUS McCREERY,
PLAINTIFF IN ERROR,

vs.

MRS. E. A. FULLER AND J. C. HASKELL,
DEFENDANTS IN ERROR.

No. 578.

In Error to the Supreme Court of California.

Brief of Defendants in Error on Motion to Dismiss for Want of Jurisdiction.

This cause was originally commenced in the State District Court of the Seventeenth Judicial District, in the County of Los Angeles, and State of California.

It was in ejectment for the southeast quarter of section fourteen, in township two, south of range fourteen west, San Bernardino meridian.

The record shows that the disputed premises were selected on the 22d of April, 1868, by the State of California, in part satisfaction of her indemnity school grant. Such selection was approved by the Secretary of the Interior November 24, 1871, and the land was thereupon duly listed to the State. On the 21st December, 1871, the State issued a certificate of purchase therefor, paid in full, to one M.

Keller, and on the 4th March, 1874, the State patented the tract to said Keller, through whom defendants in error derive title.

McCreery, the plaintiff in error here, claims to have settled upon above tract December 21, 1869, under the general pre-emption laws; to have filed his declaratory statement therefor November 28, 1871, and to have secured a patent from the United States on the 10th of October, 1879.

Claiming to be the owner in fee, Keller, on the 24th of April, 1874, commenced an action of ejectment against McCreery in the District Court of the Seventeenth Judicial District. (Record Print, p. 15.) In his answer McCreery denied the ownership of Keller, and affirmatively alleged that the State title sued upon by Keller was void because of alleged irregularities and violations of law in the selection, and because of fraud and misrepresentation in the procurement of the approval and certification thereof. He furthermore alleged that by reason of his settlement on the land as a qualified pre-emptor, and of his filing his declaratory statement therefor of his open, notorious, and adverse possession, and of his making permanent improvements thereon of great value under claim of title by virtue of his pre-emption right, he was entitled to the possession of the disputed premises. (Record Print, pp. 16 and 17.)

Upon these issues the parties to the action stipulated (Record Print, p. 17) as follows:

"In the District Court of the Seventeenth Judicial Dis-
" trict, State of California, in and for the County of Los
" Angeles.

" MATTHEW KELLER, Plaintiff,
" *against*
" RUFUS MCCREERY, Defendant. } Complaint in Ejectment.

" In this action it is stipulated that judgment may be en-

" tered of this date for the plaintiff for the possession of the " premises described in the complaint herein, but without " any rents and profits or damage for the withholding the " same. Execution is to be stayed on this judgment for " sixty days, within which time said defendant may, with- " out molestation, remove any buildings or other improve- " ments from said premises for his own use without further " compensation therefor.

" Los Angeles, June 30, 1874.

" M. KELLER.

" By BRUNSON & HUDSON,

" *His Att'ys.*

" Filed July 2, 1874.

" S. C. HUBBELL,

" *Def'ts Att'y.*"

Accordingly, and on same date, final judgment (Record Print, p, 18) was entered in favor of Keller against McCreery for the recovery of the possession of said premises, together with his costs and disbursements. Under said stipulation and judgment McCreery removed his buildings and improvements, received back moneys paid by him for taxes, and delivered to Keller possession of the disputed premises.

Being thus in possession, Keller, on October 11, 1874, sold and conveyed the premises to Frederick Fuller, who entered into possession under his deed, and resided thereon until his death in July, 1876. Since his death his widow (the defendant in error here) has continuously occupied and cultivated the land.

Five years later, viz., October 28, 1879, McCreery commenced the present suit in ejectment. It is to recover possession of the same tract of land from the same party or his privies, and upon allegation of the identical matters put in issue and decided by the final judgment rendered in 1874.

By way of separate defence, the defendant Haskell disclaimed interest in his own right, and alleged that he was in possession of the premises as the agent and employé of the defendant, Mrs. E. A. Fuller, and not otherwise. (Record Print, p. 2.)

Amongst other defences, Mrs. E. A. Fuller set up the former judgment in the suit of Keller against McCreery, and (Record Print, p. 4)—

"This defendant pleads said judgment and said action as "*res adjudicata*, and further alleges that this defendant is "the successor in interest of plaintiff in said action, and "has been in the actual possession of said premises since "October 16, 1874."

The State District Court gave judgment for plaintiff upon the merits, and defendant appealed to the Supreme Court of the State. The case was first heard before a department of that court, and then before the court in banc. After the first argument before the court in banc, the following order was made, viz., (Record Print, pp. 67 and 68:)

"In the Supreme Court of the State of California.

"McCreery
" *v.* } 8026.
" Fuller.

"1882, July 28. *Ordered*, That the submission of this "case be and the same is set aside, and that the case be "placed on the calendar for re-argument upon the question "whether or not the judgment in Keller *vs.* McCreery is a "bar to this action."

Pursuant to this order, the case was reargued solely upon the question of *res judicata;* and thereafter the following

opinion and judgment of the Court was rendered, viz., (Record Print, pp. 68, 69, and 70 :)

"*Judgment.*

"In the Supreme Court of the State of California. In Banc.

"R McCREERY, Respondent,
"*v.*
"MRS. E. A. FULLER, et al., Appellants. } No. 8026.

"On Appeal from the Superior Court in and for the County of Los Angeles.

"JANUARY 13TH, 1883.

"And now at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by McKee, J.

"I concur in the judgment.

"McKINSTRY, *J.*

"Concurring opinion by Thornton, J.

"I concur in the judgment and opinion of Mr. Justice Thornton.

"MORRISON, *C. J.*"

"Whereupon it is adjudged and decreed by the court that the judgment and order of the Superior Court in and for the County of Los Angeles in the above-entitled cause be, and the same are hereby, reversed, with costs, and the cause remanded, with direction to the Court below to enter judgment for defendants.

"*Opinion.*

"In bank. Filed January 13, 1883.

"McCREERY
"*vs.* } No. 8026.
"FULLER.

"This case arises out of an action of ejectment. From

" the record of the case it appears that the demanded prem-
" ises were selected by the State of California on the 22d of
" April, 1868; that on the 29th of December, 1869, the
" plaintiff, McCreery, entered upon them and filed his de-
" claratory statement in the proper United States Land Office
" on the 28th of November, 1871. But on the 24th of
" November, 1871, the Secretary of the Interior of the
" United States had approved the selection which had been
" made by the State; and the United States, by patent of
" that date, conveyed the land to the State. After obtain-
" ing the patent the State sold the land to one M. Keller,
" and issued to him a certificate of purchase for the same,
" which was afterwards confirmed by an act of the Legis-
" lature, entitled 'An act for the relief of purchasers of
" 'State lands,' approved March 27, 1872, and on the 4th
" of March, 1874, Keller obtained from the State a patent
" for the land.

" Claiming to be owner in fee, Keller, on the 24th of
" April, 1874, commenced an action of ejectment against
" McCreery to recover possession. By his answer to the
" complaint in that action the defendant denied the owner-
" ship of Keller, and affirmatively alleged that the patent
" issued to the plaintiff by the State of California, and un-
" der and by virtue of which his pretended title to the land
" in controversy is set up and maintained, was obtained by
" fraud and misrepresentation, and that the defendant had,
" on the 21st day of December, 1869, entered on the land
" as a qualified pre-emptor, and on or about the 28th of
" November, 1871, filed in the Land Office of the district
" in which the land was situated, his declaration of inten-
" tion to pre-empt said land, and that he was entitled to the
" possession of the same.

" Upon these issues the parties to the action stipulated,
" on the 30th of June, 1874, 'that judgment may be entered
" 'of this date for the plaintiff for the possession of the
" 'premises described in the complaint herein, but without
" 'any rents and profits or damage for the withholding the
" 'same. Execution is to be stayed on this judgment for
" 'sixty (60) days, within which time the defendant may,
" 'without molestation, remove any buildings or other im-

" ' provements from said premises for his own use, without
" ' further compensation therefor.' Judgment was accord-
" ingly entered in favor of Keller against McCreery for
" recovery of the possession of said land and premises,
" together with his costs and disbursements. Under that
" judgment Keller was put in possession of the land, and,
" being in possession, he sold and conveyed the same on the
" 11th of October, 1874, to Frederick Fuller, the then hus-
" band of the present defendant, who entered into posses-
" sion under his deed, and continued to reside on the land
" until his death, in July, 1876, since which time his widow,
" defendant in this case, has continuously, down to the com-
" mencement of this action, on October 28, 1879, occupied
" the land, cultivating the same within a substantial inclosure.

" It will be observed that the issues in that action involved
" the validity of the original selection of the land by the
" State, and of the subsequent proceedings with reference
" to it, which culminated in the certification of the land
" over to the State and the issuance of the patent to the
" State, but also the validity of the original entry on the
" land by the defendant, as a qualified pre-emptor, and the
" subsequent proceedings taken by him to pre-empt the
" same. These things being in issue were all necessarily
" determined by the judgment in favor of the plaintiff. No
" question can arise as to whether that judgment was cor-
" rect or erroneous. Standing as it does as the judgment
" of a Court of competent jurisdiction, unappealed from
" and unreversed, it is decisive of the rights of the parties
" to the subject-matter or the action whether it was right or
" wrong. Where issues are made in a case and decided,
" whether with or without trial, the judgment is conclusive
" between the same parties, in any subsequent action for
" the same cause, as to all questions which were directly
" involved within the issues made, and which were, or might
" have been, presented and decided. (LeGuen *vs.* Governor,
" 1 Johns. Cas., 436; Stockton *vs.* Ford, 18 How., 418;
" Mallony *vs.* Horan, 49 N. Y., 14; McClurg *vs.* Condit,
" 27 Minn., 45.) And such questions cannot be again con-
" tested between the same parties in the same or any other
" Court. (Hopkins *vs.* Lea, 6 Wheat., 109; Russell *vs.*

" Place, 94 U. S., 606.) As a *res adjudicata* the judgment " is binding on all tribunals, and conclusive between the " parties and those deriving title under them, as to the va- " lidity of the certification of the land over to the State, and " of the patent thereto issued by the United States to the " State, and of the patent granted by the State to Keller " upon which the judgment was founded. By the certifica- " tion and patent the title to the land passed from the United " States to the State of California. (Grinnell *vs.* R.R. Co., " 103 U. S., 742.) Thereafter the authorities of the United " States were without jurisdiction over it. The title which " had vested in the State and passed from the State to Kel- " ler, the plaintiff in judgment, could not be divested, except " by judicial proceedings to cancel or rescind the patent for " fraud, mistake, or misconstruction of the law under which " it was issued. (O'Connor *vs.* Frasher, 56 Cal., 499, and " cases cited.) No executive officer of the United States " had authority to recall or rescind the patent, or to issue " one to another party for the same tract. (Moore *vs.* " Robbins, 96 U. S., 530.) The proceedings taken by " McCreery in the Land Department of the United States, " which culminated in a patent to him for the same land, " subsequent to the acquisition of the title by the State and " to the judgment against him founded upon that title, " were, therefore, void, and conferred upon him no title.

" It follows that the judgment and order must be reversed " and the cause remanded, with direction to the Court below " to enter judgment for defendants.

" McKEE, *J.*

" I concur in the judgment.

" McKINSTRY, *J.*

" *Concurring Opinion.*

" I concur in the judgment, on the ground that the judg- " ment in Keller *vs.* McCreery is conclusive against the " plaintiff and determinative of the cause in favor of " Fuller, who derives title under Keller by conveyance

"subsequent to the rendition of the judgment above men-
"tioned.

"THORNTON, *J.*

"I concur in the judgment and opinion of Mr. Justice
"Thornton.

"MORRISON, *C. J.*"

To test the correctness of this judgment, this case has been brought to this court on writ of error.

Section 2, Article 6, of the present constitution of the State of California, adopted in 1879, provides, *inter alia*, as to judgments by the Supreme Court of the State, that—

"The concurrence of four justices present at the argu-
"ment shall be necessary to pronounce a judgment in bank;
"but if four justices, so present, do not concur in the
"judgment, then all the justices qualified to sit in the
"cause shall hear the argument, but to render a judgment
"a concurrence of four judges shall be necessary. In the
"determination of causes, all decisions of the Court in banc
"or in Departments shall be given in writing, and the
"grounds of the decision shall be stated."

ARGUMENT.

No Federal question was decided in this case by the Supreme Court of California, nor was the decision of any Federal question necessary to the judgment rendered. Yet that must be the affirmative showing upon the record in order to give this Court jurisdiction.

Murdock *vs.* City of Memphis, 20 Wall., 636.

The State Supreme Court sustained the defence of *res adjudicata*, and its judgment, now here for review, in favor of Mrs. Fuller, was put on that ground alone. It appearing in the judgment of that Court that the pleadings in the former case of Keller *vs.* McCreery were sufficient to put

in issue the identical matters between the same parties that were put in issue in the pending suit, and that these matters were determined in such former suit, the judgment therein having been unappealed from and unreversed, and whether it was right or wrong as an original question, was decided to be a bar to the present action. The decision which this Court is asked to review, then, simply involves the legal effect of a judgment set up in bar. That is a question of general law, as to which the decision of the State Court is not reviewable here.

Chouteau and another *vs.* Gibson, (111 U. S., 200,) is decisive upon this point. Upon a precisely analogous case it was therein held that—

"The present record shows that Chouteau and Maffit "began this suit against Gibson in the Circuit Court of St. "Louis County, Missouri, to obtain a conveyance of certain "lands which they claimed that he held in trust for them. "Among other defences, Gibson set up a judgment in his "favor in a suit brought by him against Chouteau and "Maffit to recover the possession of the lands, in which, as "he alleged, the identical matters presented in this case "were directly passed upon and adjudicated between the "parties. It is conceded that the State Supreme Court in "deciding the case sustained this defence, and rendered the "decree now here for review in favor of Gibson on that "ground alone, without considering any of the other ques-"tions involved. (Chouteau *vs.* Gibson, 76 Missouri, 38.)

"Such being the case, it is clear we have no jurisdic-"tion. The legal effect of the judgment set up in bar is a "question of general law, as to which the decision of the "State Court is not reviewable here. The Federal questions, "if any there were in the case, lay behind this defence, "and could not be reached until it was out of the way. "The question presented by the defence was not whether a "Federal right had been properly denied by a former judg-"ment, but whether the right had been once judicially deter-"mined so as to become *res judicata* between the parties.

" Whether an equitable title could be set up in bar of the " action at law brought by Gibson, the holder of the legal " title, to recover possession, is a question of State law " upon which the judgment of the State Court is conclusive. " The same is true of the question whether the pleadings " in the former action were such as to present the equitable " defence in proper form for final adjudication. The Court " below has decided that the pleadings were sufficient; that " the equitable defence could be made, and that the judg- " ment in that action in favor of Gibson was, in its legal effect, " a judgment that Chouteau and Maffit had no title to the " land in controversy. Consequently that judgment was a " bar to this action, and precluded the Court below as well as " this Court from reopening the original litigation and con- " sidering again the questions that were put at rest between " the parties by the decision in their former suit. It is ap- " parent, therefore, that no Federal question which there " may have been in the case was decided by the State Court, " and that the decision of such a question was not neces- " sary to the final decree rendered. Without determining " whether, if the former judgment had not been a bar to " the action, there were questions in the case that might " have given us jurisdiction, we grant the motion to dis- " miss."

It may, however, be claimed that the State Supreme Court also decided that the second patent issued to McCreery in 1879 was void, because the prior conveyance of legal title to the State being outstanding and judicially uncanceled, the Executive officers of the United States, and on authority of Moore *vs.* Robbins, (96 U. S., 530,) were without authority to issue a second patent to another party for the same tract.

If this were true, it would not confer jurisdiction. The case would then fall within the rule laid down in Jenkins, assignee, *vs.* Loewenthal and another, (110 U. S., 222.) It was therein held that where two defences were interposed, one presenting and the other not presenting a Federal ques-

tion, either of which, if sustained, constituted a complete defence, and where the State Court gave judgment for defendant on both defences, this Court would affirm the judgment below without considering the Federal question.

Murdock *vs.* City of Memphis, (20 Wall., 590,) was therein cited as sustaining this practice.

But this claim is not true. Under the clause of the constitution of the State of California, cited *supra*, a concurrence of four Judges was necessary to render a judgment in the State Supreme Court. The opinion was delivered by McKee. J., and covered both the question of *res adjudicata* and of the want of authority to issue the second patent.

McKinstry, J., concurred in the judgment, but Thornton, J., and Morrison, C. J., concurred in the judgment "on the "ground that the judgment in Keller *vs.* McCreery is con- "clusive against the plaintiff and determinative of the cause "in favor of Fuller, who derives title under Keller by con- "veyance subsequent to the rendition of the judgment above "mentioned."

Record Print, p. 70.

It follows that the requisite concurrence of four Judges was only upon the question of *res adjudicata*. Hence that was the sole point decided, and same is not reviewable here.

We ask that our motion may be granted.

A. T. BRITTON,
J. H. McGOWAN,
A. B. BROWNE,
Attorneys for Appellee.

119-321

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In the Supreme Court of the United States.

October Term, 1886.

RUFUS McCREERY,
PLAINTIFF IN ERROR,

v.

MRS. E. A. FULLER ET. AL.,
DEFENDANTS IN ERROR.

No. 46.

In Error to the Supreme Court of California.

THE CASE.

This cause was originally commenced in the State District Court of the Seventeenth Judicial District in the County of Los Angeles, and State of California.

It was an ejectment for the southeast quarter of section fourteen, in township two, south of range fourteen west, San Bernardino meridian.

The record shows that the disputed premises were selected on the 22d of April, 1868, by the State of California, in part satisfaction of her indemnity school grant. Such selection was approved by the Secretary of the Interior November 24, 1871, and the land was thereupon duly listed to the State. On the 21st December, 1871, the State issued a certificate of purchase therefor, paid in full, to one M. Keller, and on the 4th March, 1874, the State patented the tract to said Keller, through whom defendants in error derive title.

McCreery, the plaintiff in error here, claims to have settled upon above tract December 21, 1869, under the general pre-emption laws; to have filed his declaratory statement therefor November 28, 1871; to have paid in his purchase money, and to have received his certificate of entry April, 1876, and to have secured a patent from the United States on the 10th of October, 1879.

Claiming to be the owner in fee, Keller, on the 24th of April, 1874, commenced an action of ejectment against McCreery in the District Court of the Seventeenth Judicial District. (Record Print, p. 15.) In his answer McCreery denied the ownership of Keller, and affirmatively alleged that the State title sued upon by Keller was void because of alleged irregularities and violations of law in the selection, and because of fraud and misrepresentation in the procurement of the approval and certification thereof. He furthermore alleged that by reason of his settlement on the land as a qualified pre-emptor, and of his filing his declaratory statement therefor; of his open, notorious, and adverse possession; and of his making permanent improvements thereon of great value under claim of title by virtue of his pre-emption right, he was entitled to the possession of the disputed premises. (Record Print, pp. 16 and 17.)

Upon these issues the parties to the action stipulated (Record Print, p. 17) as follows:

" In the District Court of the Seventeenth Judicial Dis-
" trict, State of California, in and for the County of Los
" Angeles.

" MATTHEW KELLER, Plaintiff,
" *against*
" RUFUS MCCREERY, Defendant. } Complaint in Ejectment.

" In this action it is stipulated that judgment may be en-
" tered of this date for the plaintiff for the possession of

" the premises described in the complaint herein, but with-
" out any rents and profits or damage for the withholding
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" for sixty days, within which time said defendant may,
" without molestation, remove any buildings or other im-
" provements from said premises for his own use without
" further compensation therefor.

" Los Angeles, June 30, 1874.

" M. KELLER,
" By BRUNSON & HUDSON,
" *His Att'ys.*

" Filed July 2, 1874.

" S. C. HUBBELL,
" *Def'ts' Atty.*"

Accordingly, and on same date, final judgment (Record Print, p. 18) was entered in favor of Keller against McCreery for the recovery of the possession of said premises, together with his costs and disbursements. Under said stipulation and judgment McCreery removed his buildings and improvements, received back moneys paid by him for taxes, and delivered to Keller possession of the disputed premises.

Being thus in possession, Keller, on October 11, 1874, sold and conveyed the premises to Frederick Fuller, who entered into possession under his deed, and resided thereon until his death in July, 1876. Since his death his widow (the defendant in error here) has continuously occupied and cultivated the land.

Five years later, viz., October 28, 1879, McCreery commenced the present suit in ejectment. It is to recover possession of the same tract of land from the same party or his privies, and upon allegation of the identical matters put in issue and decided by the final judgment rendered in 1874.

By way of separate defence, the defendant Haskell dis-

claimed interest in his own right, and alleged that he was in possession of the premises as the agent and employé of the defendant, Mrs. E. A. Fuller, and not otherwise. (Record Print, p. 2.)

Amongst other defences, Mrs. E. A. Fuller set up the former judgment in the suit of Keller against McCreery, and (Record Print, p. 4)—

"This defendant pleads said judgment and said action " as *res adjudicata*, and further alleges that this defendant " is the successor in interest of plaintiff in said action, and " has been in the actual possession of said premises since " October 16, 1874."

The State District Court gave judgment for plaintiff upon the merits, and defendant appealed to the Supreme Court of the State. The case was first heard before a department of that court, and then before the court in banc. After the first argument before the court in banc, the following order was made, viz., (Record Print, pp. 67 and 68 :)

" In the Supreme Court of the State of California.

" McCreery }
" *v.* } 8026.
" Fuller. }

" 1882, July 28. *Ordered*, That the submission of this " case be and the same is set aside, and that the case be " placed on the calendar for reargument upon the question " whether or not the judgment in Keller *v.* McCreery is a "" bar to this action."

Pursuant to this order, the case was reargued solely upon the question of *res judicata ;* and thereafter the following opinion and judgment of the Court was rendered, viz., (Record Print, pp. 68, 69, and 70 :)

"*Judgment.*

"In the Supreme Court of the State of California. In Banc.

"R. McCREERY, Respondent,
"*v.*
"MRS. E. A. FULLER et al., Appellants. } No. 8026.

"On Appeal from the Superior Court in and for the County of Los Angeles.

"JANUARY 13TH, 1883.

"And now at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by McKee, J.

"I concur in the judgment.

McKINSTRY, *J.*

"Concurring opinion by Thornton, J.

"I concur in the judgment and opinion of Mr. Justice Thornton.

"MORRISON, *C. J.*"

"Whereupon it is adjudged and decreed by the court that the judgment and order of the Superior Court in and for the County of Los Angeles in the above-entitled cause be, and the same are hereby, reversed, with costs, and the cause remanded, with direction to the Court below to enter judgment for defendants.

"*Opinion.*

"In banc. Filed January 13, 1883.

"McCREERY
"*v.* } No. 8026.
"FULLER.

"This case arises out of an action of ejectment. From the record of the case it appears that the demanded premises were selected by the State of California on the 22d of April, 1868; that on the 29th of December, 1869, the

" plaintiff, McCreery, entered upon them and filed his de-
" claratory statement in the proper United States Land
" Office on the 28th of November, 1871. But on the 24th of
" November, 1871, the Secretary of the Interior of the
" United States had approved the selection which had been
" made by the State; and the United States, by patent of
" that date, conveyed the land to the State. After obtain-
" ing the patent the State sold the land to one M. Keller,
" and issued to him a certificate of purchase for the same,
" which was afterwards confirmed by an act of the Legis-
" lature, entitled 'An act for the relief of purchasers of
" 'State lands,' approved March 27, 1872, and on the 4th
" of March, 1874, Keller obtained from the State a patent
" for the land.

" Claiming to be owner in fee, Keller, on the 24th of
" April, 1874, commenced an action of ejectment against
" McCreery to recover possession. By his answer to the
" complaint in that action the defendant denied the owner-
" ship of Keller, and affirmatively alleged that the patent
" issued to the plaintiff by the State of California, and un-
" der and by virtue of which his pretended title to the land
" in controversy is set up and maintained, was obtained by
" fraud and misrepresentation, and that the defendant had,
" on the 21st day of December, 1869, entered on the land
" as a qualified pre-emptor, and on or about the 28th of
" November, 1871, filed in the Land Office of the district
" in which the land was situated, his declaration of inten-
" tion to pre-empt said land, and that he was entitled to the
" possession of the same.

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" 'without molestation, remove any buildings or other im-
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" recovery of the possession of said land and premises, " together with his costs and disbursements. Under that " judgment Keller was put in possession of the land, and " being in possession, he sold and conveyed the same on the " 11th of October, 1874, to Frederick Fuller, the then hus- " band of the present defendant, who entered into posses- " sion under his deed, and continued to reside on the land " until his death, in July, 1876, since which time his widow, " defendant in this case, has continuously, down to the com- " mencement of this action, on October 28, 1879, occupied " the land, cultivating the same within a substantial en- " closure.

" It will be observed that the issues in that action involved " the validity of the original selection of the land by the " State, and of the subsequent proceedings with reference " to it, which culminated in the certification of the land " over to the State, and the issuance of the patent to the " State, but also the validity of the original entry on the " land by the defendant, as a qualified pre-emptor, and the " subsequent proceedings taken by him to pre-empt the " same. These things being in issue were all necessarily " determined by the judgment in favor of the plaintiff. No " question can arise as to whether that judgment was cor- " rect or erroneous. Standing as it does as the judgment " of a Court of competent jurisdiction, unappealed from " and unreversed, it is decisive of the rights of the parties " to the subject-matter or the action whether it was right or " wrong. Where issues are made in a case and decided, " whether with or without trial, the judgment is conclusive " between the same parties, in any subsequent action for " the same cause, as to all questions which were directly " involved within the issues made, and which were, or might " have been, presented and decided. (LeGuen *v.* Governor, " 1 Johns. Cas., 436; Stockton *v.* Ford, 18 How., 418; " Mallony *v.* Horan, 49 N. Y., 14; McClurg *v.* Condit, " 27 Minn., 45.) And such questions cannot be again con- " tested between the same parties in the same or any other " Court. (Hopkins *v.* Lea, 6 Wheat., 109; Russell *v.* " Place, 94 U. S., 606.) As a *res adjudicata* the judgment " is binding on all tribunals, and conclusive between the " parties and those deriving title under them, as to the va-

" lidity of the certification of the land over to the State, and " of the patent thereto issued by the United States to the " State, and of the patent granted by the State to Keller " upon which the judgment was founded. By the certifica- " tion and patent the title to the land passed from the United " States to the State of California. (Grinnell *v.* R.R. Co., " 103 U. S., 742.) Thereafter the authorities of the United " States were without jurisdiction over it. The title which " had vested in the State and passed from the State to Kel- " ler, the plaintiff in judgment, could not be divested, except " by judicial proceedings to cancel or rescind the patent for " fraud, mistake, or misconstruction of the law under which " it was issued. (O'Connor *v.* Frasher, 56 Cal., 499, and " cases cited.) No executive officer of the United States " had authority to recall or rescind the patent, or to issue " one to another party for the same tract. (Moore *v.* " Robbins, 96 U. S., 530.) The proceedings taken by " McCreery in the Land Department of the United States, " which culminated in a patent to him for the same land, " subsequent to the acquisition of the title by the State and " to the judgment against him founded upon that title, " were, therefore, void, and conferred upon him no title.

" It follows that the judgment and order must be re- " versed and the cause remanded, with direction to the " Court below to enter judgment for defendants.

" McKEE, *J.*

" I concur in the judgment.

" McKINSTRY, *J.*

" Concurring Opinion.

" I concur in the judgment, on the ground that the judg- " ment in Keller *v.* McCreery is conclusive against the " plaintiff and determinative of the cause in favor of " Fuller, who derives title under Keller by conveyance, " subsequent to the rendition of the judgment above men- " tioned.

" THORNTON, *J.*

" I concur in the judgment and opinion of Mr. Justice " Thornton.

" MORRISON, *C.-J.*"

To test the correctness of this judgment, this case has been brought to this Court on writ of error.

Section 2, Article 6, of the present constitution of the State of California, adopted in 1879, provides, *inter alia*, as to judgments by the Supreme Court of the State, that—

> " The concurrence of four justices present at the argu-
> " ment shall be necessary to pronounce a judgment in banc;
> " but if four justices, so present, do not concur in the
> " judgment, then all the justices qualified to sit in the
> " cause shall hear the argument, but to render a judgment
> " a concurrence of four judges shall be necessary. In the
> " determination of causes, all decisions of the Court in banc
> " or in Departments shall be given in writing, and the
> " grounds of the decision shall be stated."

ARGUMENT.

We shall endeavor to establish the following propositions:

I. That there is no Federal question in the case.

II. That the decision of the Court below was correct upon the merits.

I.

As to the Federal question, a motion was made by the defendants in error at the last term of this Court to dismiss for want of jurisdiction, on the ground that there was no Federal question in the case.

This Court overruled the motion at that stage of the proceedings.

We now renew it, and insist that there is no Federal question before this Court. The Supreme Court of California placed their judgment upon the sole ground that the former judgment was an estoppel, and afforded a com-

plete defence. The constitution of that State requires that " to render a judgment, a concurrence of four judges shall " be necessary."

The opinion of the Court, presented in the record, shows that four judges concurred on that ground, and that alone.

The opinion of the Court was required by the constitution of the State to be " given in writing, and the grounds " of the decision shall be stated."

In such case this Court will look into the opinion to see what " the grounds of the decision " were.

In Jacks *v.* Helena, (115 U. S., 288,) the Chief-Justice, in delivering the opinion of the Court, said:

" These motions are granted on the authority of Detroit " City Railway Co. *v.* Guthard, (114 U. S., 133,) and the " cases there cited. It appears distinctly on the face of " the opinion of the Court below, which by the laws of Ar- " kansas, forms part of the record, Rev. Stat., Ark. 1884, " § 1318, (Gant's Dig., (1874) §§ 1108, 1109,) that the de- " cision of the case was put, and properly put, on a ground " which did not involve a consideration of the Federal " question that may possibly have been presented by one " of the several defences set up in the answer of the city, " to wit: That the constitution of 1874 prohibited the issue " of the bonds in dispute; in fact, it is estimated in the " opinion, that, if the case had rested on this defence alone, " the judgment would have been the other way. * * * " *Dismissed.*"

The above decision was made since the hearing of the former motion to dismiss.

The case of Chouteau *v.* Gibson (111 U. S., 200) is in point. Upon a precisely analogous case it was therein held that—

" The present record shows that Chouteau and Maffit " began this suit against Gibson in the Circuit Court of

" St. Louis county, Missouri, to obtain a conveyance of " certain lands which they claimed that he held in trust " for them. Among other defences, Gibson set up a " judgment in his favor in a suit brought by him against " Chouteau and Maffit to recover the possession of the " lands, in which, as he alleged, the identical matters pre- " sented in this case were directly passed upon and adju- " dicated between the parties. It is conceded that the " State Supreme Court in deciding the case sustained this " defence, and rendered the decree now here for review in " favor of Gibson on that ground alone, without consider- " ing any of the other questions involved. (Chouteau *v.* " Gibson, 76 Missouri, 38.)

" Such being the case, it is clear we have no jurisdic- " tion. The legal effect of the judgment set up in bar is a " question of general law, as to which the decision of the " State Court is not reviewable here. The Federal questions, " if any there were in the case, lay behind this defence, " and could not be reached until it was out of the way. " The question presented by the defence was not whether a " Federal right had been properly denied by a former judg- " ment, but whether the right had been once judicially deter- " mined so as to become *res judicata* between the parties. " Whether an equitable title could be set up in bar of the " action at law brought by Gibson, the holder of the legal " title, to recover possession, is a question of State law " upon which the judgment of the State Court is conclusive. " The same is true of the question whether the pleadings " in the former action were such as to present the equitable " defence in proper form for final adjudication. The Court " below has decided that the pleadings were sufficient; that " the equitable defence could be made, and that the judg- " ment in that action in favor of Gibson was, in its legal effect, " a judgment that Chouteau and Maffit had no title to the " land in controversy. Consequently that judgment was a " bar to this action, and precluded the Court below as well as " this Court from reopening the original litigation and con- " sidering again the questions that were put at rest between " the parties by the decision in their former suit. It is ap- " parent, therefore, that no Federal question which there

" may have been in the case was decided by the State Court,
" and that the decision of such a question was not neces-
" sary to the final decree rendered. Without determining
" whether, if the former judgment had not been a bar to
" the action, there were questions in the case that might
" have given us jurisdiction, we grant the motion to dis-
" miss."

Adams Co v Burlington RR Co. 112 U.S. 123

It may, however, be claimed that the State Supreme Court also decided that the second patent issued to McCreery in 1879 was void, because the prior conveyance of legal title to the State being outstanding and judicially uncancelled, the Executive officers of the United States, and on authority of Moore *v.* Robbins, (96 U. S., 530,) were without authority to issue a second patent to another party for the same tract.

If this were true, it would not confer jurisdiction. The case would then fall within the rule laid down in Jenkins, assignee, *v.* Loewenthal and another, (110 U. S., 222.) It was therein held that where two defences were interposed, one presenting, and the other not presenting, a Federal question, either of which, if sustained, constituted a complete defence, and where the State Court gave judgment for defendant on both defences, this Court would affirm the judgment below without considering the Federal question. Murdock *v.* City of Memphis, (20 Wall., 590,) was therein cited as sustaining this practice.

But this claim is not true. Under the clause of the constitution of the State of California, cited *supra*, a concurrence of four judges was necessary to render a judgment in the State Supreme Court. The opinion was delivered by McKee, J., and covered both the question of *res adjudicata* and of the want of authority to issue the second patent.

McKinstry, J., concurred in the judgment, but Thornton, J., and Morrison, C.-J., concurred in the judgment "on the

" ground that the judgment in Keller *v.* McCreery is con-
" clusive against the plaintiff and determinative of the
" cause in favor of Fuller, who derives title under Keller
" by conveyance subsequent to the rendition of the judg-
" ment above mentioned." (Record P., p. 70.)

There is nothing in the pretence that there was an after acquired right growing out of the issuance of the patent of the United States.

The record shows that such patent was issued upon the identical pre-emption claim set up in the former proceedings, and that absolutely nothing was ever done by McCreery *after* that judgment, in support of his pre-emption claim, except to go upon the premises, in 1876, and sleep in a covered wagon for a single night. He so testified himself. (Record, p. 48.)

II.

THE JUDGMENT BELOW WAS CORRECT.

It was founded upon the estoppel created by the former judgment. That judgment was entered against McCreery, by his agreement made in writing, in a case which, by the pleadings, involved the validity of the original selection by the State and of all subsequent proceedings which resulted in the certification of the land to the State by the Interior Department, and also the validity of the original pre-emption entry and subsequent proceedings thereon up to the commencement of the suit. By its terms he was to have the right to remove all his buildings and other improvements without making any compensation therefor. He testifies that he did remove them all except a well and some trees. (Record, p. 49.) He could not easily remove them. The taxes paid by him were refunded. He, himself, delivered up possession to Keller.

What more could he have done to show that he gave up all claim under his pre-emption? And how could the Court below fail to hold that the judgment was conclusive of his right? It did so hold, and this Court cannot avoid coming to the same conclusion. The authorities are set forth in the opinion of the Court below, and are conclusive.

Again, the judgment below was right because the land had been selected by the State before the settlement by McCreery, and, being land subject to selection and afterwards listed to the State, the title passed, and it was no longer in the power of, or under the control, of the Land Department.

This is fully established by the recent decision of this Court in Frasher *v.* O'Connor (115 U. S., 102.)

The land, in controversy in the present case, was within the claimed limits of the Sausal Redondo Rancho, but was excluded from it by the Hansen survey, which survey was held to be valid in the O'Connor case. That survey was made in February, 1868. The survey of township two (in which is the land now in controversy) was made in April, 1868, and approved by the Surveyor General of California, and the township plat was filed in the district land office of San Francisco, April 22, 1868. Thereafter all the land in that township became public land subject to the general land law of the United States. This was expressly held in the O'Connor case, *supra*. And it was held in reference to the Hansen survey of the Sausal Redondo Rancho, and the township plats filed by the Surveyor General, including that of said township two. The State selected this tract after the township plats had been filed, and on the 22d of April, 1868. *That was one year and eight months before McCreery claims to have made his settlement.* The land having been subject to selection by

the State on the 22d of April, 1868, and having then been selected, it was out of the power of any other party to acquire title to the same.

McCreery sought to avoid the effect of the selection by the State, prior to the initiation of his pre-emption claim, by attacking the regularity of the proceedings in the State selection, and charging that it was obtained by fraud. But this Court, in the O'Connor case, held that no such inquiry was permissible; that no one but the State could make such a question, and that, if it were satisfied, everybody else must be.

We invite the attention of the Court to that case, and also to the later case of Mower *v.* Fletcher, (116 U. S., 380.)

We think we have satisfactorily shown that this case must either be dismissed for want of jurisdiction, or that the judgment of the Court below must be affirmed.

A. T. BRITTON,
A. B. BROWNE,
W. H. SMITH,
Attys. for Defts.